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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1962**

## No. 482

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**LOCAL NO. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, ET AL., PETITIONERS,**

*vs.*

JACOB PERKO.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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[fol. 1] [File endorsement omitted]

# IN THE COURT OF COMMON PLEAS OF OHIO
## MAHONING COUNTY

JACOB PERKO, 39 River Street, Girard, Ohio, Plaintiff,

vs.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, 651 Market Street, Youngstown, Ohio, Defendant.

PETITION—Filed February 8, 1956

Now comes the plaintiff, Jacob Perko, and for his cause of action against the defendants and each of them states as follows:

The International Association of Bridge, Structural and [fol. 2] Ornamental Ironworkers Union (A.F. of L.) hereinafter referred to as I.A.B.S.O.I.U. is an unincorporated labor organization comprised of a number of unincorporated labor organizations called "Locals" to which I.A.B.S.O.I.U. grants charters. The defendant, Local No. 207 of I.A.B.S. O.I.U. hereinafter referred to as Local 207 is such an unincorporated labor organization.

Defendants, William E. Thomas, Henry Gorgas, Floyd Beck, Eugene Roberts, and James Castner, are and at all times hereinafter mentioned were members of the executive board of the defendant, Local 207.

The members of Local 207 are too numerous for each of them to be joined as a defendant herein. The matters herein involved, however, are of common, general interest to all the defendants and to all of the members of Local 207, and the individual defendants herein are sued as representatives of the members of Local 207 and a trial of the issues may be fairly had through the defendants as representatives of a class.

Plaintiff says that for at least 13 years prior to December 13, 1953 he was a member in good standing of the aforesaid I.A.B.S.O.I.U., and was for 12 years a member of the defendant, Local 207. Plaintiff further says that for approximately 40 years prior to December 13, 1953, he was classified as a foreman and was employed as such. That for 12 years prior to December 13, 1953, plaintiff was an employee of the William B. Pollock Company of Youngstown, Ohio, being employed in the capacity of a foreman by said William B. Pollock Company.

Defendants, without justification, conspired to deprive plaintiff of his right to continue to work as a foreman for the William B. Pollock Company and to work as foreman for any other company in the geographic jurisdiction of said Local 207. In furtherance of said conspiracy, defendant Local 207 notified the said William B. Pollock Company that plaintiff's foreman's rights had been suspended and without cause demanded that the William B. Pollock Company discharge plaintiff from his employment.

Plaintiff further says that the William B. Pollock Company refused to discharge the plaintiff from his duties as superintendent and foreman and continued to employ the plaintiff in such capacity until January 26, 1954; that the defendants in furtherance of their conspiracy to deprive [fol. 3] plaintiff of his right to work as superintendent and foreman, unlawfully and with malice instituted a strike by the members of defendant, Local 207, against the William B. Pollock Company on a job being performed at Hubbard, Ohio, for the sole purpose of coercing the William B. Pollock Company into discharging the plaintiff.

That as a consequence of said conspiracy and the aforesaid acts, plaintiff was discharged from his employment with the William B. Pollock Company on January 26, 1954.

Plaintiff says that since the time of his discharge the defendants have without justification prevented the plaintiff from procuring employment as a foreman in ironwork by representing that plaintiff's foreman's rights had been suspended by Local 207; that plaintiff is 68 years of age and unable to perform work necessitating heavy physical effort; and further that plaintiff has no other means of livelihood; that immediately prior to his discharge from the William B.

Pollock Company plaintiff was earning approximately $15,000.00 per year and that since said discharge plaintiff has been able to earn only approximately $1,000.00.

Plaintiff says that by reason of the acts of the defendants done without justification, plaintiff has been damaged in the amount of Twenty Four Thousand Dollars ($24,000.00) from loss of earnings to date and that he will continue to be so damaged in the future.

Wherefore, by reason of the premises plaintiff prays judgment against the defendants and each of them for the sum of Seventy Five Thousand Dollars, ($75,000.00) with interest thereon from the 26th day of January, 1954, at six per cent (6%) per annum and his costs herein.

Martin Goldberg and McDonald, Hopkins, Hood & Hardy, Attorneys for Plaintiff.

[fol. 4] *Duly sworn to by Jacob A. Perko, jurat omitted in printing.*

---

[fol. 6] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS OF OHIO

MAHONING COUNTY

Case No. 148440

[Title omitted]

ANSWER—Filed May 26, 1956

Leave of Court having been first duly had, comes now the Defendants and for their first defense, say that the Petition does not state a cause of action and should therefore be dismissed.

Defendants for their second defense. admit that Local Union No. 207 of the International Association of Bridge Structural and Ornamental Iron Workers Union, (A.F. of L.) is an unincorporated labor organization and that William E. Thomas, Henry Gorgas, Floyd Beck, Eugene

Roberts, and James Castner, were members of the executive board of Local Union No. 207.

Further answering, Defendants deny each and every allegation in Plaintiff's Petition not expressly admitted.

Wherefore, having fully answered, Defendants pray that Plaintiff's Petition be dismissed and that they may go hence with their costs.

Green, Schiavoni & Anderson, Attorneys for Defendants.

[fol. 7] *Duly sworn to by William E. Thomas, jurat omitted in printing.*

---

[fol. 8] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS OF OHIO

MAHONING COUNTY

[Title omitted]

REPLY—Filed September 10, 1956

[fol. 9] Now comes the Plaintiff, Jacob Perko, leave of court having been first obtained, and replying to the defendants' answer herein says that the Defendants have continued to this date to prevent the Plaintiff from pursuing his trade by with-holding Plaintiff's foreman's rights and that by reason thereof Plaintiff is still unable to procure employment within the jurisdiction of the Defendant Local 207.

Plaintiff further replying to the Defendant's answer herein denies all of the allegations thereof which are not admissions of or consistent with the allegations of Plaintiff's Petition and further renews the prayer of his Petition.

Martin S. Goldberg, McDonald, Hopkins, Hood & Hardy, Attorneys for Plaintiff.

*Duly sworn to by Jacob Perko, jurat omitted in printing.*

[fol. 10] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS OF OHIO

MAHONING COUNTY

[Title omitted]

MOTION TO DISMISS PETITION—Filed September 27, 1956

Come now the defendants and respectfully move the Court for an order dismissing plaintiff's petition for the reason that this Court does not have jurisdiction over the subject matter of the cause of action.

Green, Schiavoni & Anderson, Attorneys for Defendants.

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[fol. 11] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS OF OHIO

MAHONING COUNTY

[Title omitted]

JOURNAL ENTRY DISMISSING PETITION—January 25, 1957

It appearing from the petition herein, the brief submitted and the oral argument of Counsel that Plaintiff did not exhaust all of his remedies within the union before commencing his cause of action. The motion of said Defendant to dismiss the action for want of jurisdiction of this court is hereby sustained and the petition dismissed on the grounds that this court does not have jurisdiction over the Plaintiff's cause of action.

Exceptions are noted.

Harold B. Doyle, Judge.
1/25/57

Approved By:

Martin S. Goldberg, Attorney for Plaintiff.

Eugene Green, Attorney for Defendants.

Note: copies of this Journal Entry mailed to Attorney Eugene Green, Erie Terminal Building.

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[fol. 12] [File endorsement omitted]

IN THE COURT OF APPEALS OF OHIO

MANDATE FROM THE COURT OF APPEALS

General Code, Sec. 12223-37

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The State of Ohio,
Mahoning County.

At a term of the Court of Appeals, within and for the County of Mahoning in the State of Ohio, begun and held before Hon. John C. Nichols, Hon. Lynn B. Griffith, Hon. Elmer T. Phillips, Judges, at Youngstown on the 23rd day of September A. D. 1957 among other proceedings then and there had by and before said Court, as appears by its Journal, were the following, viz:

No. 3924

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JACOB PERKO, Plaintiff-Appellant,

vs.

WILLIAM R. THOMAS, et al., Defendants-Appellees.

---

On this day this cause came to be heard on questions of law from a judgment in favor of Defendant Appellees rendered in the Common Pleas Court of Mahoning County, Ohio.

After examination of briefs which were filed by counsel representing each party, and oral arguments, and after this Court had the opportunity of reviewing the bill of exceptions and after due deliberation, this Court affirms the judgment of the Court of Common Pleas.

This Court further finds there were reasonable grounds for appeal on questions of law.

Wherefore, it is therefore ordered, adjudged and decreed by this Court that the judgment of the Court of Common Pleas is hereby affirmed and that judgment be entered herein in favor of Defendant Appellees and against Plaintiff Appellant for all costs incident to this appeal.

To all of which rulings of the Court Plaintiff Appellant is hereby given due exception.

Approved:

Eugene Green, Attorney for Defendant-Appellees.

Martin S. Goldberg, Attorney for Plaintiff-Appellant.

John C. Nichols, Lynn B. Griffith, Elmer T. Phillips, Judges.

[fol. 13] I, William F. Quinlan, Clerk of the Court of Appeals of Ohio, within and for Mahoning County, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court, this 31st day of October 1957. William F. Quinlan, Clerk of Court of Appeals, By Julia Olsavsky, Deputy.

(Seal)

COURT OF APPEALS OF OHIO
WITHIN AND FOR SAID COUNTY

The State of Ohio,
County of Mahoning.

To the Honorable Court of Common Pleas, within and for said County, Greeting:

We do hereby command you that you proceed without delay to carry into execution the within and foregoing judgment of your Court of Appeals in the cause of

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JACOB PERKO, Plaintiff-Appellant,

vs.

WILLIAM R. THOMAS, et al., Defendants-Appellees.

---

Witness William F. Quinlan, Clerk of our said Court of Appeals, at Youngstown, Ohio, this 31st day of October 1957. William F. Quinlan, Clerk, Julia Olsavsky, Deputy.

[fol. 14]

---

PERKO, Appellant,

v.

LOCAL NO. 207 OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION et al., Appellees.

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PERKO, Appellant,

v.

THOMAS et al., Appellees.

* * * * * * *

OPINION—July 2, 1958

Appeals from the Court of Appeals for Mahoning County.

* * * * * * *

[fol. 15] Messrs. McDonald, Hopkins, Hood & Hardy and Mr. Martin S. Goldberg, for appellant.

Messrs. Green & Schiavoni, for appellees.

Per Curiam. Defendants contend that the petitions do not state a cause of action at common law; that there is presented an instance of a union member seeking a monetary award from the union to which he belongs and from its duly elected representatives, without alleging that he has exhausted the remedies provided by the constitution and bylaws of the union; and that a state court has no jurisdiction to award a judgment against a union or its representatives for money damages resulting from loss of employment caused by union activity proscribed as an unfair labor practice by the National Labor Relations Act.

Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. He is not seeking reinstatement. He is not asking for equitable relief. He is alleging that the union to which he belonged and certain named officials thereof committed a common law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment with the William B. Pollock Company, for which he asks money judgments.

To require the plaintiff to first exhaust his remedies provided by the constitution and bylaws of the defendant union, as contended by defendants, by appealing to the union, the one alleged to have committed the tort, to determine a monetary award for such tort, would be requiring a vain thing, especially since it has not been pleaded or established that the union has internal remedies available to plaintiff.

Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National [fol. 16] Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state

court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell*, and *International Association of Machinists* v. *Gonzales* (decided May 26, 1958), 355 U. S., ——.

The trial court was in error in dismissing the petitions for want of jurisdiction.

Judgments reversed and causes remanded.

Weygandt, C. J., Zimmerman, Stewart, Taft, Matthias, Bell and Herbert, JJ., concur.

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[fol. 17]

THE SUPREME COURT OF THE STATE OF OHIO

January Term, A. D. 1958

No. 35428

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JACOB PERKO, Appellant,

vs.

LOCAL NO. 207 OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION et al., Appellees.

---

Appeal from the Court of Appeals of Mahoning County.

JUDGMENT—July 2, 1958

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and said cause is hereby remanded to the said Court of Common Pleas for further proceedings.

It is further ordered and adjudged that all court costs, including the cost of bills of exceptions, shall abide the final judgment or order in said cause.

Ordered, That a special mandate be sent to the Court of Common Pleas of Mahoning County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Mahoning County, "for entry."

I, Elliot E. Welch, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this 9th day of July, 1958. Elliot E. Welch, Clerk. By ....., Deputy.

[fol. 18] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS OF OHIO

MAHONING COUNTY

[Title omitted]

AMENDED ANSWER—Filed September 29, 1956

First Defense

Leave of Court having been first duly had, come now the Defendants and for their first defense admit that Local Union No. 207 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO is an unincorporated labor organization and that William E. Thomas is Business Representative of Local No. 207.

Further Answering, Defendants deny each and every allegation in Plaintiff's Petition not expressly admitted.

Second Defense

For their second defense, the Defendants say that any conduct in which they may have engaged with respect to the William B. Pollock Company and the Plaintiff's employment as a superintendent or supervisor for that company was within the protection of Section 7 of the National Labor Relations Act 49 Stat. 449, 452. Such conduct permitted by the National Labor Relations Act is not a Cause of Action under the Law of Ohio.

Wherefore, having fully answered, Defendants pray that [fol. 19] Plaintiff's Petition may be dismissed and that they may go hence with their costs.

Green and Schiavoni, Attorneys for Defendants.

*Duly sworn to by William E. Thomas, jurat omitted in printing.*

[fol. 20]

IN THE COURT OF COMMON PLEAS

Case No. 148440

---

JACOB PERKO, Plaintiff,

vs.

LOCAL 207, et al., Defendant.

---

JUDGMENT ON VERDICT—Filed January 28, 1959

The Court in this case having sustained a motion for judgment for defendants;

It Is Therefore Considered, Adjudged and Decreed by the Court that judgment be and is hereby rendered for defendants and that the defendants recover from the plaintiff their costs herein expended and that the plaintiff pay his own costs.

E. WARDEN, JR., Judge.

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[fol. 21]

IN THE COURT OF APPEALS OF OHIO

MANDATE FROM THE COURT OF APPEALS

The State of Ohio, Mahoning County.

At a term of the Court of Appeals, within and for the County of Mahoning in the State of Ohio, begun and held before Hon. Lynn B. Griffith, Hon. Elmer T. Phillips, Hon. John L. Donahue, Judges, at Youngstown on the 1st day of June A. D. 1959 among other proceedings then and there

had by and before said Court, as appears by its Journal, were the following, viz:

No. 4053

JACOB PERKO, Plaintiff-Appellant,

vs.

LOCAL No. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, et al., Defendant-Appellee.

This cause came on to be heard on the Notice of Appeal of Jacob Perko, Plaintiff-Appellant together with the Transcript of the Docket or Journal Entries of the Court of Common Pleas of Mahoning County, Ohio, with the Bill of Exceptions, the Briefs of the Appellant and Appellees and the Record. The appeal was duly argued by counsel.

The Court, after careful consideration of the entire record finds that the Plaintiff, Appellant has not sustained the burden of proof resting upon him in support of the allegations contained in his petition and that the judgment of the trial court in sustaining the motion of the Defendant, Appellee for judgment on the evidence notwithstanding the failure of the jury to agree upon a verdict should be and the same is hereby affirmed. Exceptions are allowed to the Plaintiff, Appellant.

It is further ordered that the Appellant pay the costs of the proceedings, taxed at $..... and in default thereof, execution issue.

Lynn B. Griffith, Elmer T. Phillips, John L. Donahue,
Judges of the Court of Appeals.

Martin Goldberg, Attorney for Plaintiff-Appellant.
Eugene Green, Attorney for Defendant-Appellee.

[fol. 22] I, William F. Quinlan, Clerk of the Court of Appeals of Ohio, within and for Mahoning County, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said court, this 27th day of August, 1959.

William F. Quinlan, Clerk of Court of Appeals.

By Julia Olsavsky, Deputy.

(Seal)

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Court of Appeals of Ohio

Within and for said County

The State of Ohio,
County of Mahoning,

To the Honorable Court of Common Pleas, within and for said County, Greeting:

We do hereby command you that you proceed without delay to carry into execution the within and foregoing judgment of your Court of Appeals in the cause of Jacob Perko, Plaintiff-Appellant vs. Local No. 207 of International Association of Bridge, Structural and Ornamental Iron Workers Union, et al., Defendant-Appellee.

Witness William F. Quinlan Clerk of our said Court of Appeals, at Youngstown, Ohio, this 27th day of August, 1959.

William F. Quinlan, Clerk.

Julia Olsavsky, Deputy.

[fol. 23]

IN THE SUPREME COURT OF OHIO

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PERKO, Appellant,

v.

LOCAL No. 207 OF INTERNATIONAL ASSN. OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, et al., Appellees.

---

OPINION—June 1, 1960

Appeal from the Court of Appeals for Mahoning County.

• • • • • • •

[fol. 24] Messrs. McDonald, Hopkins, Hood & Hardy and Mr. Martin S. Goldberg, for appellant.

Messrs. Green Schiavoni & Murphy, for appellees.

*Per Curiam.* Section 2323.18, Revised Code, provides, in part, as follows:

"When, upon the statements in the pleadings or upon the evidence received upon the trial, or both, one party is entitled by law to judgment in his favor, upon motion of such party, filed as provided in Section 2323.181 of the Revised Code, judgment shall be so rendered by the court although the jury may have failed to reach a verdict or a verdict has been rendered against such party and a judgment entered thereon, and whether or not a motion to direct a verdict has been made or overruled, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

[fol. 25] The motion for judgment in the Court of Common Pleas was sustained upon the claim that the defendant "is entitled by law to judgment upon the evidence received on the trial" and the affirmance by the Court of Appeals was based on the finding that the plaintiff "has not sus-

tained the burden of proof resting upon him in support of the allegations contained in his petition."

The finding of the trial court that the defendant "is entitled by law to judgment upon the evidence received on the trial" was not a finding that there was no evidence to support a judgment for the plaintiff. If the judgment was so intended the trial court could have made that finding. It should be noted that defendants' request for judgment at the end of plaintiff's evidence was overruled and, when renewed at the end of all the testimony, was again overruled. The jurisdiction of the trial court to hear this action was determined by this court in its prior decision, *supra.* See, also, *International Assn. of Machinists* v. *Gonzales,* 356 U. S., 617, 2 L. Ed. (2d), 1018, 78 S. Ct., 923, and *International Union* v. *Russell,* 356 U. S., 634, 2 L. Ed. (2d), 1030, 78 S. Ct., 932. This leaves us, therefore, only the question of evidence.

Obviously, the trial court was not of the opinion that there was no evidence to support the plaintiff's cause or it would have so ruled at the end of all the testimony, if not at the end of plaintiff's testimony. The only construction remaining to be resolved so far as the trial court's decision is concerned relates to the burden of proof and the affirmance of the trial court's judgment by the Court of Appeals on the ground that plaintiff had "not sustained the burden of proof resting upon him." That appellate court finding recognizes that the finding of the trial court was reached by weighing the evidence. The affirmance was without an accompanying opinion explaining or setting forth how defendant "was entitled by law to judgment in his favor."

Had the jury arrived at a verdict for either plaintiff or defendants the trial court would have been without authority under Section 2323.18, Revised Code, quoted *supra,* to have rendered judgment for the adverse party on the basis of weight of the evidence. Upon such a finding, the trial court would have been required to grant a new trial. Had a verdict been found for either party and judgment [fol. 26] entered accordingly, the Court of Appeals would have been without authority on appeal to enter final judgment for the adverse party or modify the trial court judgment (except as to remittitur) on the weight of the evidence.

The burden which rested upon the plaintiff in this case was to establish the material averments of his cause of action by a preponderance of all the evidence. *Ginn, Admr.*, v. *Dolan*, 81 Ohio St. 121, 90 N. E., 141, 135 Am. St. Rep. 761; *Klunk* v. *Hocking Valley Ry. Co.*, 74 Ohio St., 125, 77 N. E., 752; 21 Ohio Jurisprudence (2d), 161 *et seq.*, Section 154; *Brunny, Admx.*, v. *Prudential Ins. Co.*, 151 Ohio St., 86, 93, 84 N. E. (2d), 504.

The fact that no verdict was rendered by the jury because of its failure to agree does not deprive the parties of their respective rights to try the case again. The trial court could have entered its judgment only after finding that at the conclusion of all the testimony and after construing all the relevant and competent evidence adduced most strongly in the plaintiff's favor, it was in law not sufficient to warrant the relief prayed for in the petition of the plaintiff.

In the case of *Dick* v. *Railroad Co.*, 38 Ohio St., 389, at page 392, it is stated in the opinion:

"If there was evidence tending to support the issue, the court below erred in arresting it from the jury. It is only, where no evidence is introduced by the plaintiff, tending to support the issue, or where it is such as to show clearly, that he has no cause of action, that it is the duty of the court, to direct judgment of nonsuit."

In the case of *Poske* v. *Mergl*, 169 Ohio St., 70, 157 N. E. (2d), 344, this court stated the rule in relation to "weight" or "sufficiency" of the evidence, as a basis for a granting of a new trial. Paragraph one of the syllabus is as follows:

"Where the evidence in the trial of a case is such that the case must be submitted to a jury to find for either the plaintiff or defendant, and where the trial court after its review of the evidence on a motion for a new trial is convinced that there is insufficient credible evidence to sustain a judgment upon the verdict of the jury, such court may, in its discretion, grant not more than one new trial for that reason."

The finding by the trial court that judgment should be [fol. 27] rendered "upon the evidence received on the trial" is insufficient to authorize judgment for the defendants and the finding of the Court of Appeals that plaintiff "has not sustained the burden of proof resting upon him in support

of the allegations in his petition" is likewise insufficient. The judgment must, therefore, be reversed and the cause remanded to the Court of Common Pleas for a new trial.

*Judgment reversed.*

Weygandt, C. J., Matthias, Bell and Herbert, JJ., concur.

Zimmerman, Taft and Peck, JJ., dissent.

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[fol. 28]

THE SUPREME COURT OF THE STATE OF OHIO

January Term, A. D. 1960

Appeal from the Court of Appeals of Mahoning County.

No. 36247

---

JACOB PERKO, Appellant,

vs.

LOCAL NO. 207 OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, et al., Appellees.

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JUDGMENT—June 1, 1960

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and said cause is hereby remanded to the said Court of Common Pleas of Mahoning County for a new trial.

It is further ordered and adjudged that all court costs, including the cost of bills of exceptions, shall abide the final judgment or order in said cause.

Ordered, That a special mandate be sent to the Court of Common Pleas of Mahoning County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Mahoning County, "for entry."

I, John W. McMillan, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this 8th day of June, 1960.

John W. McMillan, Clerk.

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[fol. 3]

IN THE COURT OF COMMON PLEAS

State of Ohio,
County of Mahoning, ss.

Case No. 148440

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JACOB PERKO, Plaintiff,

vs.

LOCAL 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, et al., Defendants.

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**Defendants' Bill of Exceptions**

APPEARANCES:

Attorneys Martin Goldberg and T. McDonald, On behalf of the Plaintiff;

Attorney Eugene Green, On behalf of the Defendants.

Be It Remembered that at the trial of the above entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, at the September Term of said Court, A. D. 1960, beginning on the 28th day of November, 1960, and continuing thereafter, as hereinafter noted, before the Honorable David G. Jenkins, and a jury of twelve members, the above appearances having been made, the following proceedings were had:

* * * * * * *

[fol. 5] FRANCIS N. WALSH, who, being duly sworn, testified as follows:

Direct examination.

By Mr. Goldberg:

Q. State your full name.
A. Francis N. Walsh.
Q. Where do you live?
A. 3950 Lockwood Boulevard, Youngstown.
Q. What sort of work do you do, sir?
A. Field superintendent, William B. Pollock Company, in charge of outside construction.
Q. How long have you been employed?
A. Thirty-one years.
Q. And as field superintendent, can you tell us briefly what your duties are, sir?
A. To supervise and take charge of all the outside construction of the Pollock Company.
[fol. 6] Q. Mr. Walsh, you are acquainted with Jake Perko?
A. Yes.
Q. How many years have you been acquainted with Mr. Perko?
A. Oh, I think I first met him about 1939, and he worked for me probably from around '40 or '41, until about 1953, '54.
Q. And when you say Mr. Perko worked for you, can you tell us in what capacity he worked for you?
A. Worked as a foreman, job superintendent.

Q. And what were his duties as job superintendent?

A. To supervise a particular job, the particular jobs he would be put on by the company.

Q. And did this work as superintendent involve supervision over more than one craft?

A. Yes. Originally, it was iron workers and hoisting engineers; then in recent years the boilermakers got into the work and it would be iron workers, boilermakers and hoisting engineers.

Q. And from your experience with Mr. Perko, from your recollections, sir, how many years did Mr. Perko work for the Pollock Company?

A. Oh, in my time possibly 12 years, I suppose, 12, 13 years.

Q. And during that period of time you say he was employed as a superintendent and foreman?

[fol. 7] A. That is right. There would be times probably when work was slow that he would work in a gang or work as an iron worker; but as a rule as a foreman or superintendent.

Q. Mr. Walsh, up until the time that Jake Perko left the Pollock Company, was his work satisfactory?

A. Yes.

Q. Did the Pollock Company consider him competent?

A. You say did they?

Q. Yes.

A. Yes; or we would not have hardly kept him that long.

Q. Do you have any idea of what his earnings were the last few years he worked for the Pollock Company?

A. That varied; anywhere probably from 8 to 12, $13,000 a year, I suppose; somewhere in that neighborhood.

Q. Mr. Walsh, taking you back to the latter part of 1953, was Jake Perko employed by the Pollock Company during that period of time?

A. Yes.

Q. And what was his job status?

A. Well, he was job superintendent, most of the time that year.

Q. And did that involve directing the activities of more than one craft during that period of time?

A. Yes; on certain jobs. As a rule, it was mostly iron

workers; but—let's say iron workers and engineers. Other [fol. 8] jobs it was the three crafts, boilermakers, iron workers, engineers.

Q. What was the last job Jake Perko worked on for the Pollock Company?

A. A stove job at the Ohio Works.

Q. Do you recall what months that job was in progress?

A. It started in October and worked on through until about the latter part of January, 1954.

Q. And Jake was the superintendent on that job during that period of time?

A. That is right.

Q. No. During those months that you just told us, October of 1953 through January of 1954, did any disputes arise on the job?

A. Yes. We had one. There was a jurisdiction dispute about—between the two crafts, iron workers and boilermakers.

Q. And was anything done on the job that affected Jake's employment that you recall during that period of time?

A. Well, the dispute went to the labor management committee, as I recall; and the job was stopped for about two days; and the labor management committee rendered a decision on it, giving erection of the new stove to the boilermakers which the company figured was the boilermakers' work; and the iron workers come back to man the rigs or the crane and the Chicago boom had on another stove. There was an area practice clause in there that [fol. 9] total manhours on the job, whichever had the greater amount of hours, would man the rigging; and the labor management committee rendered a decision that that was the iron workers since they had the highest total number of hours on the job.

Q. Well, sir, did any difficulty arise with Jake himself, Mr. Perko himself, on that job, on that particular job?

A. Well, it was after this dispute that the men come back to work that one morning, I think that probably it was the first morning after the dispute, they come out on the job and I was informed by the steward on the job they were no longer going to take any order from Mr. Perko. First I thought they were kidding, but after talk-

ing to some of the iron workers I found out they weren't. So that was the only thing that—

Q. Did they tell you where those orders came from?

A. They said the executive board is what they told me.

Q. And did you personally observe the men refusing to take orders from Jake Perko at any time during that job?

A. Well, yes; because they had told me that they were not going to take any orders from him; and I know that he tried to, and he'd tell me that they would not.

Q. Well, following that communication, how were the orders given to the iron workers on the job from that point on?

A. Well, I went out—I would go to that job first thing in the morning before anywhere else, and lined up the iron workers crews and then I would leave or stay if I had [fol. 10] no other place to go.

Q. In other words, you took over some of Jake's duties as far as the iron workers were concerned?

A. That is right.

Q. And you gave the orders to the men in his place?

A. To the foreman.

Q. To the foreman. And they would be relayed down to the journeymen on the job?

A. That is right.

Q. Do you recall how many iron workers were on that job from October through January, 1954?

A. Oh, somewhere in the neighborhood of 9 to 12, 13; I suppose; it would vary.

Q. Did you or your company make any effort to assist Mr. Perko in getting straightened out with the union?

A. Well, at first we thought that this kidding, as I said, then the thing would resolve itself and be settled. So we went along to the fact we didn't want to hurt the customer. We were told we could not have any more work stoppages. Later on the office or someone tried to contact the union. I know that after it went on so long, then they contacted St. Louis, the International.

Q. Your company contacted St. Louis?

A. That is right.

Q. In trying to help out Mr. Perko?

[fol. 11] A. Yes. We felt we had an obligation since he

had worked for us. We were trying to clarify the thing and get him straightened out.

Q. Did you obtain any results in your efforts?

A. Yes. We were told by—I think Mr. Downs, that the thing would be straightened out and everything would be all right; but that was the last we heard about it.

Q. Well, actually, did Jake get straightened out to a point where he could go back to work for the Pollock Company?

A. Not to my knowledge.

Q. Do you recall how long Jake was carried on the payroll?

A. I think we finished the job the last of January. Possibly five weeks, I would imagine. We carried him as long as we could. Of course, we could not use him anywhere if he could not supervise a job.

Q. Now, Mr. Walsh, did Mr. Perko make any attempt to obtain work with the Pollock Company following February?

A. Yes. He would come down to the office and called me different times.

Q. Did the Pollock Company have work that was available or jobs going upon which they could have hired Mr. Perko?

A. Yes. We had work in '54, '55.

Q. And was Jake qualified to undertake that work?

A. Well, you can't put a man on a job as a superintendent if he can't supervise the men and give orders to the men. [fol. 12] In other words, you can't have two superintendents on the job. One man has to be the boss and run the job.

Q. Well, from a standpoint of his qualifications, had Mr. Perko—knowledge of the business and so forth—been straightened out with his union, would your company have hired him in 1954?

A. Yes.

Q. There were jobs available upon which he could have been hired?

A. Yes.

Q. Did Mr. Perko seek employment with your company during 1955?

A. Yes. He has probably called or stopped in the office through the years, I suppose, until 1957.

Q. Then what happened after 1957?

A. I guess he gave it up as a bad cause about that time; he has not called since.

Q. Mr. Walsh, would you be good enough to tell us just a little bit about the nature of your work, how work stoppages can seriously affect it, some of the ramifications of that?

A. Well, our particular type work as a rule is blast furnace work, and it is work that the steel companies, of course, want completed as fast as possible. If you have a furnace or stove or something off, they want it back on as fast as they can get it to get production. And any time [fol. 13] you have a work stoppage, your company is getting a black eye. So that naturally you try to avert them as much as possible and keep the job as straight as you can without getting into trouble.

Q. Mr. Walsh, as a matter of fact, was there a work stoppage at any point during this dispute between the boilermakers and iron workers, either in Hubbard or Youngstown?

A. Yes; there was a period of two days that the job was stopped, as I say; it went to the labor management committee and they rendered a decision on it; and then the job went back to work. I think it was off two days, two or three days.

Q. Mr. Walsh, do you recall the date that you were notified that Mr. Perko's foreman rights had been taken away?

Mr. Green: Objection.

The Court: What is the objection, please?

Mr. Green: He said, do you recall the day—

The Court: He means the date, I think.

Mr. Green: There has been no testimony from this witness that his foreman rights had been taken away.

The Court: I sustain the objection. It is to the inference that your question includes.

Q. Mr Walsh, do you recall the date that you were [fol. 14] notified that the men would no longer take orders from Perko?

A. Early part of December; probably around the 4th, 5th, 6th, of December, somewhere in that period; I would not recall exactly.

Q. Was it before this dispute was resolved by, this jurisdictional dispute, was resolved, the joint labor management committee?

A. No; it was right directly after that, I think.

Q. Do you recall in substance what the job steward told you?

A. Well, they said that Mr. Perko was educating the boilermakers in their particular work; so that they felt they weren't going to take orders from him any more.

Q. Did they indicate to you what would occur if they did take orders from him?

A. They told me they'd be fined.

Mr. Goldberg: That is all.

Cross examination.

By Mr. Green:

Q. Mr. Walsh, will you tell us what kind of work does the William B. Pollock Company do?

A. Steel plate, fabrication, erects blast furnaces, cars, most anything pertaining to basic steel; that is, primary steel, iron and steel.

[fol. 15] Q. The fabrication, is the fabrication work of the company under your supervision or jurisdiction?

A. Not the fabrication; that is done in the shop.

Q. You have shop employees to perform fabrication work?

A. That's right.

Q. And in addition to fabrication work, which I assume is sold to your customers across lines, you do erection?

A. Yes, sir.

Q. Construction work is a separate division of the William B. Pollock Company?

A. Yes; it's all one company, but a separate department.

Q. Does that department have construction jobs going on in various parts of the county?

A. Yes, sir.

Q. In 1953, would you recall where some of the construction jobs you had at that time were being performed?

A. Well, we had one job at U. S. Steel, Youngstown; another job in Hubbard; I don't recall whether we had one in Sharpsville at that time.

Q. Is that Sharpsville, Pennsylvania?

A. Yes, sir; and I believe we had one at the Sheet and Tube. There would be numerous jobs during that year; I would not recall back seven years ago.

Q. Would there be jobs that year outside the State of Ohio?

[fol. 16] A. Yes, sir.

Q. A number of them?

A. Yes.

Q. How would you man the jobs that were performed outside of the State of Ohio?

A. Well, of course, we would go into a place, usually hire what they call a local union and hire the different men from the crafts.

Q. So that if you had a job going on in Pittsburgh, and you were required to obtain the services of iron workers, you would hire the iron workers who resided in the Pittsburgh area?

A. Well, there is supposed to be a clause you are allowed to take in 50 per cent of your own people and hire the other 50 per cent locally. That varies with the amount of work in each particular area. You as a rule send in a job superintendent and your office force and some key or lead men and the balance are hired through the unions.

Q. Now, in 1953, Mr. Perko was working for you as a job superintendent?

A. That is right.

Q. Who determines who is to be hired in the capacity of superintendent?

A. I do, mostly.

Q. That is the company prerogative or company right?

[fol. 17] A. Yes, sir.

Q. Does the union have any right under its contract to tell you who may be hired by you as a superintendent?

A. No.

Q. That is solely your judgment to determine that?

A. That is right.

Q. Must your superintendent belong to a labor union?

A. Not necessarily.

Q. Now, who makes the determination as to what employees will be employed in a capacity of a foreman?

A. Well, the company as a rule does that; if you go into some area where, say, you don't know what men you are getting, you rely upon the business agent probably to recommend certain man to be foreman who is qualified.

Q. Is there anything in the contract that you have with Local Union 207 which would give that Union the right to tell you who you may use in the capacity of a foreman?

A. No.

Q. And the determination as to who will occupy the position of a foreman on a construction job is the determination of the company; is that not true?

A. The company or job superintendent. Usually, as a rule we leave it to the job superintendent. He has to work the men, so he as a rule picks the foreman.

Q. You have testified that you have been field superin- [fol. 18] tendent for the Pollock Company for a number of years. Tell me again the number of years?

A. Field superintendent, probably 21 years. I said I was with the company for 31 years; but I have been superintendent for 21.

Q. During your experience as field superintendent, you have had many occasions which you were called upon to deal with the Local Union 207?

A. Yes.

Q. You stated in your direct testimony that up until about 1950, the work in the mills on blast furnaces was performed by iron workers; is that correct?

A. Yes; probably later than that. It was around '51, '52, we started to get into trouble with the boilermaker.

Q. When you say you started to get into trouble with the boil[illegible]r, explain that?

A. We[illegible]ior to that time, the iron worker had been doing most all the blast furnace work all over the country. But when the shipyards closed, the boilermaker had to start looking for somewhere else to work; and there had been—a directive or work given to the boilermaker back

in 1928 which stated blast furnace work; so that they did get into blast furnace work which they had not been doing too much of before that. That is when we started having jurisdictional disputes and various companies were called [fol. 19] into a meeting between the International Association of Iron Workers and International of Boilermakers; and awards were made on the different parts or phases of blast furnaces and different parts awarded to each different craft.

Q. Now, is this true that the boilermakers about 1951 or '52—

A. Somewhere around then.

Q. —came to your company and made demands upon your company that certain portions of the blast furnace work and stove work be assigned to members of their craft rather than to iron workers?

A. They didn't come to our company; it was a case of country-wide. It was not just the Pollock Company; it was all the blast furnaces erectors.

Q. I didn't mean to single out your company. But among the companies, demand was made upon your company as one of them?

A. That is true.

Q. The business agent for the boilermakers at that time in the Youngstown area was a man by the name of Mr. Kenny?

A. That is right; John Kenny.

Q. Did Mr. Kenny make any demands upon you as field superintendent?

A. At that particular time or somewhere around there, there was another fellow, Warren Hoff, I believe that was his name, Kenny was assistant. Yes, of course, they used [fol. 20] to come after us demanding certain parts of the furnace work was their work.

Q. Now, in order to resolve the dispute then that was created by demand of the boilermakers upon your company for the work on blast furnaces, did your company submit the issue to a local labor management committee?

A. Would you ask that again, please?

Q. Did your company, after a demand was made upon it by the boilermakers for the work on blast furnaces, sub-

mit the issue as to the proper assignment of work to a local labor management committee?

A. Well, there were various meetings, as I recall, between the two crafts; and I think the labor management council was in on it where they tried to settle local disputes. But in the meantime, the International Association got into it through the National Labor Relations Board; we had had a dispute, and a work stoppage, because the iron workers came in on the job, but we had had quite a few fights and arguments about the work; and finally John T. Dunlap, who was chairman of the National Arbitration Board, contacted us and wanted to know all about the job and had to send photographs of a blast furnace and they in turn come in with a temporary decision awarding certain parts of a blast furnace to the boilermaker. So from then on, of course, we had to abide by that until such a time as the two Internationals met and agreed on [fol. 21] certain parts of the work and made their decisions. From then on, of course, the company tried to live up to those awards.

Q. Getting back again to the local situation, the dispute between the boilermakers and iron workers, did your company submit to a local labor management committee the question of who was to do certain work?

A. Yes; as I say, we had the one dispute on this job which was decided by the local labor management committee.

Q. Now, who sat on that local labor management committee?

A. There were various officers from the other crafts; I would not recall who they were. I think George Shutrump was the chairman of the committee. I would not begin to remember after seven years who the others were now.

Q. Is this a true statement, that there were an equal number of management representatives and equal number of union representatives sitting on that committee?

A. That is right.

Q. And is it further true that your company, the boilermakers and iron workers agreed that they would be bound by the determination made by that local committee when you submitted the question to them for resolution?

A. Yes.

Q. You testified, I believe, in direct examination that the job had been shut down as a result of a jurisdictional dispute in 1953, the Ohio Works stove job?

[fol. 22] A. That is right.

Q. Who shut the job down?

A. The iron workers.

Q. How did they do that?

A. Well, I don't recall just how it was done. There was one job going in Hubbard, all the men were pulled off the job in Hubbard; and we were notified, of course, or they notified the boilermakers, however it was, but anyhow, it was thrown into the labor management committee for a settlement and we stopped the job right then.

Q. The company ordered the job to stop while it was before labor management; is that what happened?

A. I am not sure whether we stopped it or whether it was just stopped due to the fact as no men came out on it as long as there was this arbitration or dispute on it.

Q. You have been in industrial relations for a long time; were there any pickets at the job?

A. Not that I recall, no.

Q. Anybody around carrying signs, distributing literature that there was a strike on?

A. No, sir.

Q. Had you been informed by the union that the union had called a work stoppage against your company?

A. Yes.

Q. What were you informed?

[fol. 23] A. Pardon?

Q. How were you informed?

A. I don't recall that; whether the office was called or we were notified on the job or what. I don't remember that at all.

Q. You have no recollection as to how this matter came to a head?

A. No, sir.

Q. Do you have any recollection as to the date that this occurred?

A. As I say, it was around the 1st of December; I know that, 1953.

Q. Do you recall whether it was on the Hubbard or on the Ohio Works stove job?

A. Well, it must have been the Hubbard job that was stopped due to the fact we had no iron workers on the Ohio Works job at that particular time. The iron workers had finished up their work dismantling the stove probably the week before; then we started erection job the following week; and we were using boilermakers which the two Internationals had agreed on. The erection of the new stove was the boilermaker work. But as I say, there was a dispute as to a local area practice which was to the man hours on the job, I believe; and I think that is what threw it into labor management.

Q. Well, was it a contest by the iron workers saying they [fol. 24] should have been allowed to man the boom and rig?

A. That is right.

Q. That they had the number of man hours, therefore, they should have been assigned the work at the Ohio Works?

A. That is right.

Q. At that time you say there were no iron workers at all working at the Ohio Works job?

A. Ohio Works job? No.

Q. That job was shut down?

A. It was shut down. Whether we called the job off to get the dispute settled, and I think that was it, because the customer was afraid they may have some other jobs in their particular plant stopped which they could not afford; so I think they asked us to stop it until such a time this was settled.

Q. So the request to shut the job down came from your customer, the U. S. Steel Company?

A. I think so; I can't just say that that is absolutely the way, but I believe it was.

Q. You shut the job down, submitting it to labor management?

A. Yes, sir.

Q. At that time, was Mr. Perko in your employ at the Ohio Works job?

A. Yes.

[fol. 25] Q. And he was working on the stove job at the time it was shut down?

A. Yes.

Q. But there were no iron workers working with him at that time?

A. No.

Q. Mr. Perko remained in your employ after the matter was submitted to labor management?

A. Yes.

Q. You say that shortly after, and probably, I believe is what you testified, the day after labor management came through with the decision the iron workers on the job advised you that they would not take orders from Mr. Perko?

A. That is right.

Q. They further advised you, I think you testified, that he was guilty of teaching the boilermakers how to do their work?

A. Yes.

Q. Therefore, they would not work with him. Did they at the same time demand, when they told you this, did they ask you to fire Mr. Perko?

A. No.

Q. Did they threaten to strike you unless you fired Mr. Perko?

A. No.

[fol. 26] Q. Did they at any time after this one day make any demand upon you that you fire Mr. Perko?

A. No.

Q. Did any officer of the union, other than the steward to whom you referred, ask you to dismiss Mr. Perko?

A. No, of course not.

Q. Did you, after you were advised by the men working under Mr. Perko, incidentally, how many men were working for him at that time?

A. You mean on the complete job?

Q. No; at the time this incident occurred, how many iron workers were on the job?

A. Well, as I stated before, I'd say somewhere between 9 and 13, I suppose.

Q. Now, on the day that the steward—

A. Pardon me. It may not have been that many that

day, since we had boilermakers on the erection. Let's say five or six men, I suppose.

Q. Between five and six men?

A. Yes.

Q. And among them was a steward?

A. Yes.

Q. Foreman?

A. That is right.

Q. And several other journeymen?

[fol. 27] A. Yes.

Q. These are the men that you say refused to take orders from Mr. Perko?

A. That is right.

Q. They continued in your employ on that very same job for what length of time after they advised you that they would not take orders from Mr. Perko?

A. Probably about six or seven days.

Q. And then what happened to them?

A. Well, their part of the job was complete, or whether then the decision came through from the two Internationals that manning the rig was the boilermakers' work, but I know that after six or seven days the iron workers were finished. Then later after the stove was erected, there were stairways and bridge and walkway across the stove which is the work of the iron worker. Then we called the iron worker back to complete that phase of it.

Q. That would be sometime in January, is that right, that you called the iron workers back?

A. Yes, towards the end of the job.

Q. Mr. Perko was still on the job?

A. Yes.

Q. Do you know who the iron workers were that you called back to do the stairways and bridge?

A. No, I would not recall that.

[fol. 28] Q. Do you know whether they were the same iron workers that were working on the day the steward told you they would not take orders from Mr. Perko?

A. There were some of them.

Q. Some?

A. I don't know that they were all there; because we did take some over to the Hubbard job; and I think I spread

them on other jobs. Then when we got ready for the stove, walkway and stairs, we called them back, transferred them from one job to another.

Q. If I understand you correctly then, Mr. Perko worked while the stairways were being put up; the rig? And iron workers also worked at that time?

A. He was on the job, yes.

Q. In January?

A. As superintendent.

Q. Now, in your experience as a field superintendent, when it was necessary to call Local 207 over some problem that had arisen on the job, who would you call for?

A. Usually call the union hall.

Q. And who would the union hall would you ask for?

A. I'd ask for Mr. Thomas or whoever happened to be business agent.

Q. Mr. Thomas is the business agent in 1953?

A. Yes.

[fol. 29] Q. Was it your custom to call Mr. Thomas in the event of a jurisdictional dispute, boilermakers making demand upon you for work assigned to iron workers, call Mr. Thomas?

A. We contacted all the crafts involved.

Q. But in order to contact a craft, you would call the business agent of the union?

A. That is right.

Q. You would not call the steward?

A. No.

Q. You kept Mr. Perko on your payroll through the completion of the stove job at U. S. Steel, did you not?

A. Yes, sir.

Q. After the bridge was put up and stairways were erected, the iron workers were again laid off?

A. Yes.

Q. Mr. Perko was retained in the company's employ?

A. That is right.

Q. You kept him on your payroll for how long?

A. As I said, probably five or six weeks; I don't recall exactly.

Q. Bring it sometime in the month of March, 1954?

A. Somewhere around there, I would imagine.

Q. Did you have any work in March of 1954?

A. Yes.

Q. Where?

[fol. 30] A. Well, I had a job going at Sharpsville.

Q. Pennsylvania?

A. Pennsylvania. And I believe I still had work in Hubbard; and there were probably other jobs. I don't recall that far back over all the years the jobs I have been on; I can't remember that.

Q. At that time, did you give as reason to Mr. Perko for laying him off?

A. Well, I believe so. Of course, it was understood, since he could not run a complete job, he would not be any good to the company if he could not run the complete job.

Q. My question was, did you give him a reason?

A. I said "yes", I believe so, or at least it was mutually understood.

Q. I am not asking for an understanding. Did you say anything to him? Do you recall saying anything to him?

A. Yes, I would have had to tell him if I could not use him to run a complete—that I just could not carry him any longer.

Q. Once again, Mr. Walsh, because this is important; tell us, if you recall, not what you suspect you might recall, but if you recall, what did you tell Mr. Perko when you laid him off in March of 1954?

A. That we could not use him any longer because he could not work as a job superintendent due to his dispute with the [fol. 31] union.

Q. Now, in between the time that you had been advised by the men who were working under Mr. Perko's direction, on the job, and March of 1954, that period of time, did you inquire of the Local Union officers, either Mr. Thomas, the business agent, or the president, executive board, or of the International Association, as to whether it was true that the iron workers would not work for Mr. Perko?

A. Yes. The office called; and I don't know who they talked to or what, but I do know the company contacted the International trying to get the thing straightened out for Mr. Perko.

Q. Do you recall my question?

A. Yes.

Q. My question is whether you made any inquiry as to whether it was true that either the International or Local had directed its members not to work under Mr. Perko?

A. I don't know that I did; but the company did, because they would not have gone to the International if they had not tried to talk with the Local.

Q. When you say the company did, who in the company went to the International or called the International?

A. Probably Mr. Kincaid or myself or Mr. Pollock, one of the three, probably.

Q. Do you know whether you did?

[fol. 32] A. I talked to the International one time and I know there was correspondence on it.

Q. In your discussion with the International Union, did you raise the question that I have asked about, and that is, did this Local Union for the International Association instruct its members not to take orders from Mr. Perko?

A. The International didn't instruct them and I can't say who instructed them. All I know is—is what the steward told me and the foreman on the job.

Q. But you did not make any further inquiry. Is that the answer to my question?

A. I can't recall that. I think we have talked of this before. I don't remember how it came about or what, but I know certainly there was conversation on it sometime.

Q. But you don't recall specifically what that conversation was?

A. No, sir.

Q. And you have no recollection of making a personal investigation to determine what, if any, difficulty Mr. Perko was having with the Union; is that right?

A. No, sir. We thought it was one of those matters that would be settled. It was a case of a dispute of a man with his union. It was not the company; wasn't a jurisdictional dispute. It was the man and his Local Union or his International.

Q. And you assumed that would be resolved in time?

[fol. 33] A. We thought it would be one of those things that would be settled and no one hurt too badly.

Q. How did you know in March of 1954, that it had not been settled?

A. Well, Mr. Perko told us it had not.

Q. You accepted Mr. Perko's word; is that it?

A. Yes, sir.

Q. You didn't at that time call Mr. Thomas and ask him whether the differences with Mr. Perko had been settled, in March of 1954, did you?

A. I certainly could take the man's word for it that he was not all right with his Union and if he wanted employment he certainly was not going to tell me he was all right if he was not.

Q. You are stating that you accepted Mr. Perko's assertion he was still having trouble with the Union?

A. That is right.

Q. You say that Mr. Perko came back to you and asked for work later in the year 1954?

A. Yes.

Q. Did he?

A. Yes.

Q. Did he tell you at that time that he was going to apply for social security benefits?

A. No, sir.

[fol. 34] Q. Did he ever advise you that he was applying for social security benefits?

Mr. Goldberg: Your Honor, at this time I want to object to questions on social security, because that is a matter of privilege.

The Court: It is not a question of whether he went on or not. It is a question of his attitude of mind. Isn't that it?

Mr. Green: That is exactly it.

The Court: What he told you. You are being asked whether or not he told you that.

A. No; I don't recall his ever telling me that he was applying for social security, if that is what your question is.

Q. Did he talk to you about wanting that amount of employment which would permit him to earn an amount that would not interfere with the benefits that he would receive from social security?

A. No, he never asked me that.

Q. He never advised you that that was what he was looking for?

A. Never asked me for that kind of employment, no, sir.

Q. Did he indicate to you how long he wanted to work?

A. No.

Q. He did not in 1954?

A. No, sir.

[fol. 35] Q. Did he in 1955?

A. No, sir.

Q. Did he ask for employment in 1956?

A. I believe so. I think Jake would call or come down to the office probably until 1957.

Q. Now, from 1954 to 1956 is a period of two years. You testified that during this period of time Mr. Perko kept asking for employment. Did you ask him at any time in 1955 as to whether he had straightened out with the Union?

A. Yes.

Q. And he advised you what?

A. That he had not been.

Q. Did you call the Union in 1955?

A. No, sir.

Q. In 1956, when he applied for employment, was the question again raised as to how he stood with his Union or—

A. He probably told me or I had asked, yes, but I can understand he never was straightened out from what I can understand.

Q. Well, when you say from what you understand, do you mean by that that what you understand is based on what Mr. Perko told you?

A. Yes.

Q. And solely on that?

A. That is right.

[fol. 36] Q. In 1955, 1956 and 1957, did the William B. Pollock Company have work in other areas other than the Youngstown area?

A. Yes, sir.

Q. You employed superintendents and foremen on those jobs?

A. Yes, sir.

Q. Was there anything that would have prevented you from sending Mr. Perko to a job in another state or in another area?

A. Probably not.

Q. So that even if he were having difficulty with Local 207, that fact would not have prevented him from being useful to you in another area; isn't that true?

A. Well, excepting you are always afraid of repercussions that maybe the thing won't work out right. So you don't take those chances.

Q. Well, when you talk about a risk being involved in assigning him to the Pittsburgh area, first of all, I think you testified that whether he is a union member or not, a union member would not affect his right to be a job superintendent; is that true?

A. Not a job superintendent; but if he were working as a foreman, he would have to have a union card to give orders to that particular craft.

Q. Isn't this also true on the job, that the chain of [fol. 37] command is superintendent, two foremen, gives the instructions to the foremen and then the foremen gives instructions to the craft involved?

A. That is right.

Q. And it would work that way? If you have iron workers, Mr. Perko is superintendent for the men, give him his instructions, he would relay them in turn to the journeymen?

A. That is right.

Q. If Mr. Perko had instructions to give to the boilermakers, he would go to the boilermaker foreman, give instructions to him, and he in turn would give it to the boilermakers?

A. That is right.

Q. Same for the question of operating engineers; is that correct?

A. Yes.

Q. All right. Now, you did not at any time send Mr. Perko to work in a jurisdiction that is outside the jurisdiction of Local 207, did you?

A. No.

Q. The question that you raise as to the risk that might be involved is purely speculative as to whether there would be any trouble if he would be sent outside; isn't that true?

A. That is true; but on every job we have ever run the superintendent has been a union man, has had a card.

Q. Well, do you require that?

[fol. 38] A. It has more or less been company practice. He is working with the crafts; we usually employ a union man as a superintendent.

Q. Well, you are not changing your testimony that the union has no right to tell you who is going to be your superintendent?

A. No, I am not changing that at all. It's been the company practice, I have said, to use a union man as superintendent.

Q. Does it make a difference as to what union he belongs to?

A. No.

Q. So that if you had a member of the Operating Engineers, that man would qualify under company practice to be a job superintendent?

A. That is true.

Q. And similarly, a member of the Boilermakers Union would qualify under company practice to be a job superintendent?

A. Yes.

Q. Or a member of the Carpenters Union?

A. Yes.

Q. As long as he was one of the craft. Mr. Walsh, when a journeyman advises you as field superintendent that he is not going to take an order from a foreman or from a superintendent, what is your normal reaction?

[fol. 39] A. Probably the job superintendent or someone would fire him right then before it would ever get to me.

Q. So that is what, the man refused to take an order from a person with authority, he would probably be fired?

A. That is right.

Q. And if you had this right at the time the iron workers advised you they would not take any instructions from Mr. Perko, you could have fired them?

A. Yes.

Redirect examination.

By Mr. Goldberg:

Q. Mr. Walsh, when the second crew of iron workers came back in January, did that crew also refuse to take orders from Mr. Perko?

A. That was the same—well, no, there were part of them. Yes, that is true; the steward notified me right away they weren't going to be taking orders from Mr. Perko.

Q. Have you ever had any experience where you fired a whole crew on a particular craft or a whole craft on a job and gotten out a second crew to replace them?

A. It has happened, yes.

Q. Will you tell us about the mechanics of that; what has happened when you have done that?

[fol. 40] A. Oh, times where things have happened where we fire a crew and get another crew and everything is all right. Sometimes when there is a dispute like this, probably it backfires on you, because the next crew you would get out would say the same thing that they weren't going to take orders from that superintendent; and you just have a vicious circle. You would be hiring and firing all the time.

Q. When Mr. Perko was applying for work, was he applying for part-time work or full-time work?

A. Applying for a full-time job as he always did. Of course, this work—sometimes you have a lot of work, sometimes you have overtime jobs, but it varies with the amount of employment.

Q. Mr. Walsh, in determining which craft was to do a certain phase of the work, did the company instruct Mr. Perko as to which craft to use for the different phases of the work?

A. Yes, we usually do that, particularly at this time since it was such a hotbed as far as the iron workers and boilermakers; we were trying to keep things as it was settled in the joint agreement.

Q. Then to summarize, Jake's orders to the boilermakers for different phases of this work were by directions of the company; is that right?

A. That is right.

Q. And this is the matter which was in dispute between [fol. 41] the two crafts; who was to do which phase of work?

A. Yes. It had been in dispute some time; but as I say, there had been some joint agreements made, but there had been some local area practices that weren't settled in that country-wide agreement.

Q. Then this dispute was actually arbitrated by the joint labor management committee?

A. Right.

Q. And resolved in favor of the boilermakers?

A. No. The labor management committee said the company is right inasmuch as they were using a boilermakers to erect a new stove; but the reason the iron workers came back on the job, they said due to area practice of the craft with the highest total number of hours would man the rigging. So that is the reason we put the iron workers back on.

Q. Now, even after this joint labor management committee decision, did the men still refuse to take orders from Mr. Perko?

A. Oh, that was when they first refused, when they came back after the dispute.

Q. And did they continue to refuse Mr. Perko's orders during the entire time of that job?

A. Yes. They were only there probably six or seven days after the dispute until later in January when they came back in to put up the stairs and walkways.

[fol. 42] Q. And during the entire period of time that the iron workers were on the job from the time you were notified of their refusal to take Mr. Perko's orders, from that time to the end of the job, did you give the orders instead in his place?

A. Yes; I would line up the iron workers in the morning; foreman, and get the job lined up and started that way.

Q. Oh, yes, just one more thing, Mr. Walsh. In discussing this work stoppage that took place, actually, there were two jobs going, one in Hubbard and one at the Ohio Works; isn't that correct?

A. There may have been more than that; that is the two I know of right now.

Q. The one in Hubbard, was that one where the iron workers just didn't show up for work or was it one where the company called the men off?

A. The company didn't call them off. They just didn't show up or what, but they didn't work for about three days. That was all an iron worker job.

Mr. Goldberg: Thank you, sir.

Recross examination.

By Mr. Green:

Q. Mr. Walsh, up until 1953, have you sent Mr. Perko to work for the company in territory outside the territorial jurisdiction of Local 207?

[fol. 43] A. Yes.

Q. On many occasions?

A. Quite a few, I would say.

Q. But after 1953, on this one day when the men told you they would not take orders from him, you never did try to assign him to work outside the area?

A. No, sir.

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[fol. 44] Whereupon, the Plaintiff called HENRY GORGAS, who, being first duly sworn, testified as follows:

Cross examination.

By Mr. McDonald:

Q. State your name, please.

A. Henry Gorgas.

Q. And your address?

A. 250 Scotland Avenue.

Q. You are employed as an iron worker; is that correct?

A. That is right.

Q. And do you hold an office with the Local 207?

A. Yes, sir; I am the president.

Q. How long have you been president, Mr. Gorgas?

A. It is either eight or ten years; I'd have to look back at the date, either eight or ten years, I know.

Q. So it would be in 1952, at least, since that time you have been president of the Union?

A. That is right.

Q. Can you tell us, so therefore you would be president back in December of 1953?

[fol. 45] A. Yes, sir; that is right.

Q. Now, can you tell us the names of the other gentlemen that were the officers of 207 back in December of 1957?

A. Well, Castner was the vice-president, Jimmie Castner; Ralph Hubby was on the executive board; Jimmie Corbett; Floyd Beck; Eugene Roberts; and our recording secretary at that time was Danny McCarthy, he is deceased right now.

Q. You have mentioned the executive board. What does the executive board consist of?

A. Five men.

Q. And how are they chosen?

A. They are elected every two years.

Q. Are these members of the executive board also officers?

A. Yes, sir, they are.

Q. So that automatically the officers of the Union are members of the executive board; is that correct?

A. They are elected as the executive board; that is their title.

Q. So that the vice-president is not necessarily a member of the executive board?

A. No, sir.

Q. So besides your officers that you have with the Union, you also have an executive board; is that correct?

A. Yes, sir.

[fol. 46] Q. What is the function of the executive board?

A. To take care of any grievances and negotiate contracts that comes up in the Union.

Q. Now, does the executive board have charge of offices as well—

A. Yes. Next to the main body of the Union, they are the most important in the Union. They govern the Union.

Q. I see. Now, back in 1953, December of 1953, who was the business agent for the Union?

A. William Thomas.

Q. Now, how often are the officers and business agent elected?

A. Every two years.

Q. Is there any particular time of the year that they are elected?

A. June.

Q. So you say that you have been president of Local 207 for either eight or ten years, so you were either elected in June of 1952 or June of 1950; is that correct?

A. That is right.

Q. Now, you have heard Mr. Green on his opening statement tell the jury that your Local Union No. 207 is an unincorporated association?

A. Yes, sir.

Q. And how are you governed? Do you have any docu-[fol. 47] ment like a Constitution that sets up your rules?

A. Yes; we have an International Constitution.

Q. Mr. Gorgas, I hand you what has been marked for identification purposes as Plaintiff's Exhibit No. 1. Will you identify that to the jury, please.

A. This is the International Constitution.

Q. Is there a date on that Constitution, please?

A. I will get my glasses. 1956.

Q. Now, do you recall, Mr. Gorgas, if there have been any changes made in that Constitution from, say, December of 1953 until 1956, the date on that book?

A. There were probably—only time that the Constitution would be changed is at the International convention; that is once every four years. We had one here this year. And that is the only time this Constitution can be changed. I don't believe—there was very few, only minor changes in that at that time.

Q. Well then, if you met every four years and had a meeting this year, you also had a meeting in 1956; is that correct?

A. That is right.

Q. And then the meeting prior to that would have been in 1952?

A. Yes, sir.

Q. So between the date of December, 1953, and the date of that Constitution, there were no changes made; is that correct?

[fol. 48] A. No, sir, not to my knowledge.

Q. Now, is it not a fact, Mr. Gorgas, that that book that you are holding which you have called the International Constitution also establishes the Constitution governing the Local Unions of your particular Union?

A. Yes, sir, it does.

Q. Mr. Gorgas, we have heard Mr. Green refer to working rules that are binding upon your Local Union; are those published in book form?

A. They are, yes. Our working rules, yes.

Q. Do you have a copy of those rules, those working rules?

A. I have the later copy. I don't think it is quite the same. There isn't very many changes since then. Published in a book like this. It is an agreement is what it really is.

Q. This is an actually agreement between your Local Union and the Steel Erecting Contractors in this area; is that correct?

A. That is right.

Q. What is covered by this agreement?

A. Our wages.

Q. In general?

A. Conditions on the job; that is what it pertains to; our wages and our working conditions on the job.

Q. Anything stated in here about grievances against members of the Union or anything like that?

[fol. 49] A. That would be in the Constitution. That is only strictly—working rules on the job, conditions and everything.

Q. I see. Now, will you refer to your Local Constitution, being Plaintiff's Exhibit 1, and identify in here the provisions setting forth how charges may be placed or made against individual members of your Union?

A. I have the same thing here; I have got it wrote down where I can find it quick.

Q. Okay. Will you identify the particular section?

A. Charges on Page 46 and on 117; 46 and 117.

Q. Now, the section on Page 117, that is Section 13 of the Constitution governing all Local Unions; isn't that correct?

A. That is right.

Q. Will you tell the jury for what reasons charges may be brought against an individual member of your Union?

A. Do you want me to read that paragraph?

Q. Please.

A. "Charges can be preferred against any member of a local union by a member of the International Association for violation of the local union constitution, by-laws or working rules. Said charges must be preferred in writing to the local union and shall be heard before the executive committee or a jury of twelve members, where possible, all of whom must be in good standing in the local union. If the accused member elects to be tried before the executive committee, it will require the votes of at least five mem-[fol. 50] bers of the executive committee to convict him. If the accused elects to be tried by a jury, the vote of nine members will be necessary for conviction. The decision of the executive committee or jury must be reported at the following meeting of the local union."

Q. Charges were filed against Mr. Perko on December 4, 1953; isn't that correct?

A. I believe that is the right date, sir.

Q. Mr. Gorgas, I hand you what has been marked for identification purposes as Plaintiff's Exhibit No. 2. Will you identify that to the jury, please?

A. These are the written charges.

Q. That were filed against Mr. Perko on December 4, 1953?

A. Yes, sir.

Q. Are those the charges under which he was tried by the executive board?

A. Yes, sir.

Q. And found guilty; is that correct?

A. Yes, sir.

Q. Now, if you will, please, would you pull out those working rules that you showed me a few moments ago, the book of working rules.

(Witness takes book from pocket.)

Q. Now, was Mr. Perko charged with violating anything in those working rules?

[fol. 51] A. Not in these working rules, no; part of the Constitution—

Q. Mr. Gorgas, you have told us the members of the executive board that were in charge of the Union back in December of 1953; and you have stated that, I believe, it was Daniel McCarthy has since departed. Are the same men now on the executive board of your Union?

A. No, sir.

Q. What changes have been made?

A. Mr. Corbett isn't on the executive board now; and Mr. Hubby isn't on the executive board; or Mr. Beck.

Q. Well, are the other members of the executive board that were members back in December of 1953, here in the courtroom today and available to testify?

A. No. Jimmie Castner is still the vice-president; but there is the only members that were here at that time when Mr. Perko was tried.

Q. I beg your pardon. I didn't understand you.

A. Our present executive board isn't here; just the executive board of what was in office at that time.

Q. Is that entire executive board here in the courtroom today?

A. No, there isn't.

Q. Who is missing?

A. Eugene Roberts is missing. He had to work. He is [fol. 52] working in Pittsburgh and he will be back either tomorrow or the next day.

Q. I see. All right. Are the other members all here?

A. Yes, sir.

Q. Now, Mr. Gorgas, will you please define for us the term "foreman". What is a foreman?

A. Foreman. Well, I can tell you. You have your regular iron worker journeyman; then foreman is over them; he can have any number of men that the company chooses; and over him, well, then our working rules, if you have three foremen, then you have a general foreman; over him the superintendent.

Q. So a foreman then does he have to be a member of the Union?

A. Yes, sir, the foreman does.

Q. And he is in charge of journeymen iron workers?

A. Yes, sir.

Q. He is the only one that gives orders directly to these journeymen iron workers?

A. Yes, sir, that is right.

Q. And your local working rules, is it, that provides if there are more than three foremen there must be a general foreman?

A. Yes, sir.

Q. Now, there is a difference between general foreman and superintendent; is that correct?

[fol. 53] A. Yes, sir, there is.

Q. So a general foreman is a foreman of one craft only; is that correct?

A. Yes, sir.

Q. So all he has to do is give orders only to the foremen of his own particular craft?

A. Yes, sir.

Q. Whereas, the job superintendent gives orders to foremen of various crafts?

A. Yes, sir.

Q. Now, will you tell us what a steward is?

A. A steward is a representative of the Union on the job.

Q. And he is a member of the Union, of course?

A. Yes, sir.

Q. What are his duties on the job?

A. He acts as a safety man and acts as a—in jurisdictional disputes the representative of the Union on our line of work.

Q. You say a jurisdictional dispute. You mean one that comes up right at the job?

A. Yes. He will get ahold of the business agent, if there is any dispute between the different crafts. His duty is to get ahold of the business agent and settle it.

Q. You say it is the steward's job, if there are any jurisdictional dispute or problems on the job, to get ahold of [fol. 54] the Local Union business agent?

A. Yes, sir.

Q. Whose job it is to settle the dispute?

A. Yes, sir.

Q. Now, as between say the foreman and steward, the steward is most likely to know these working rules that govern your Union; is that correct?

A. I think general knowledge all members; because a book of working rules any member can get them.

Q. But it is the steward's job to enforce those rules on the job, working rules?

A. Yes, sir, it is.

Q. And the foreman has nothing to do with enforcing those rules?

A. No, sir.

Q. The job superintendent has nothing at all to do with enforcing those working rules?

A. No, sir.

Q. Now, a job steward, he has the power to actually shut down the job if there is a jurisdictional dispute; right?

A. He has to get ahold of the business agent first; that is his first duty.

Q. Say the business agent is out of town; he does have the power to stop the job if he feels it is an emergency?

A. He could if he wanted to; but I don't know of any of [fol. 55] them that ever done it without getting ahold of the business agent first. There are very few disputes that are that critical that they can't wait a day or so.

Q. Mr. Gorgas, does your executive board have regular meetings?

A. Yes, sir; twice a month.

Q. Twice a month, you say?

A. Yes, sir.

Q. Do they meet on any particular day of the month?

A. Second and fourth Tuesdays.

Q. Now, how about your general membership meetings?

A. First and third Mondays of every month.

Q. Are records kept of both the executive board meetings and general membership meetings?

A. Yes, sir; they are.

Q. How are they kept?

A. Our secretary keeps the minutes.

Q. You have an elected recording secretary who takes the minutes?

A. Yes, sir; that is right.

Q. Are those kept in special books?

A. Yes, sir, in special books.

Q. Minute books?

A. Minute books.

Q. Are those books here in the courtroom today?

[fol. 56] A. I believe they are.

Q. Are these the books here? (Indicating.)

A. Yes, sir.

Q. Will you have those available throughout the course of this trial so that we may refer to those in case occasion comes up?

A. Yes, sir.

Q. Now, the recording secretary is, of course, a member of your union?

A. That is correct.

Q. He works as a journeyman iron worker?

A. Yes, sir.

Q. Now, are these records kept fairly accurate?

A. Well, we are not regular—you could not expect them to be the same as a regular secretary or stenographer; just an iron worker; he tries to keep them accurate.

Q. You mean he does not take minutes like the gentleman sitting next to you?

A. No, sir; I'm afraid not.

Q. But do these records accurately reflect the business, that is, that does come before these meetings?

A. Yes, sir, they do.

Q. I notice you have two books here. Is one for the executive board meeting and other for the general membership meetings?

[fol. 57] A. There are two separate books; yes.

Q. For the different types of meetings?

A. That is right.

Q. And then are these minutes approved, say the executive board minutes?

A. Yes, sir, they are.

Q. At the following meeting they are read and approved?

A. Yes, sir. They are always approved. If there are any corrections to be made, they are always made.

Q. Who presides at the executive board meetings?

A. I do.

Q. Do you have a vote in those meetings?

A. No, sir; only way I have to have a vote if there was a tie vote.

Q. But you always preside, and not Mr. Thomas?
A. That is right.
Q. Is Mr. Thomas, your business agent, a member of the executive board?
A. No, sir.
Q. Is he always present at the meetings of the—
A. Yes, he is always present. He is there on the job all the time; we have questions to ask.
Q. Does he have a vote?
A. No, sir, he does not.
Q. Say you were sick or for some reason could not make [fol. 58] the meetings, would Mr. Thomas then preside?
A. No, sir; the vice-president.
Q. Mr. Gorgas, are you familiar with the Plaintiff, Mr. Perko?
A. What is it?
Q. Are you acquainted with Mr. Perko?
A. Yes; I have seen Mr. Perko quite often.
Q. Have you ever worked with him?
A. I worked on the same job where he has been on.
Q. How long have you known Mr. Perko? For how many years?
A. Gosh, it's been quite a few years; between 15 and 20 years; I should judge.
Q. Can you tell the jury what his trouble with the Union has been?
A. They should not have been any trouble with the Union at all. If he had went ahead—

The Court: No. He wants to know what was the trouble.
The Witness: What was the trouble?
The Court: Yes, what was the trouble, if there was any.

A. Well, on these specific charges here, we have a motion in our minute book at regular meeting, that anyone helping and teaching boilermakers to do our work is subject to a fine; and that is where Mr. Perko violated our [fol. 59] motion there; and he was tried on that particular motion.
Q. And he violated those charges you have identified?
A. Yes, sir; we had at that time we had quite a dispute with the boilermakers, between the boilermakers and iron

workers; we felt they was trying to do our work and most of them at that time was not able to and we didn't want any of our members to teach them how to do our work; and the body passed the motion that our members was not allowed to help them or teach them how to do our work.

Q. And that is what Mr. Perko was charged with?

A. Yes, sir, it is.

A. And found guilty?

A. Yes, sir.

Q. He was fined; is that correct?

A. That is correct.

Q. Now, do you know why he was unable to get work as an iron worker after March of 1954?

A. There is only one reason, he didn't want work or Mr. Pollock wanted to gradually ease him out. That could be only one reason. He could have sent him out of town, which he has done on occasions, and put him to work there. If the trouble was only here, he could have sent him anywhere.

Q. My question was, do you know why he was unable to obtain work?

A. No, sir, I do not.

[fol. 60] Q. And as president of the Union, you, it is your duties to know what is going on within the Union; isn't that correct?

A. That is correct.

Q. But you have no personal knowledge of why Mr. Perko was not employed as an iron worker after March of 1954?

A. No, sir; that is strictly between employer and him; because the Union didn't have anything to do as far as hiring Mr. Perko was concerned.

Q. Well, isn't it true that your Union revoked his foreman's rights?

A. You can only try a man on the charges; because these charges have to be reviewed by the International. And if you try a man on anything besides what is written in here, the International would just throw it out.

Q. What you tried him on was exactly what is written on that piece of paper?

A. That is right. Foreman was not even mentioned in his trial.

Q. Nothing was done as far as foreman's rights were concerned?

A. Yes, sir.

Q. Is that what you are telling us?

A. No, sir; couldn't have been.

Q. You say?

A. The Constitution does not give you any right to take [fol. 61] any man off of being a foreman. We don't have anything to do or say about being a foreman or superintendent, either one.

Q. Well now, Mr. Gorgas, referring to Section 45 of your Constitution, Plaintiff's Exhibit 1, will you read that to the jury please?

A. Section 45: "No local union shall for any cause whatsoever deprive members of this Association of their foreman rights unless approved by the general executive board."

Q. So your Constitution does provide for revoking a man's foreman's rights provided, however, that it is approved by the International Union?

A. Yes, sir; and it's never been done to my knowledge since I have been in the Union.

Q. How long have you been a member of the Union?

A. I served my apprenticeship between 1927 and 1929; and ever since 1927 I have been a member of a Union.

Q. Are you telling us that no foreman's rights were revoked where the International approved it or no foreman's rights were revoked during that period whatsoever?

A. I have never heard of any—only one I have ever heard of taking the foreman's rights away as employer. If a foreman isn't competent, they either demote him or fire him. That is the only way I have ever heard of a foreman being deprived of his rights.

Q. Since you have been a member since 1929, you have [fol. 62] never heard of any occasion where any foreman's rights have been taken away from a man by his own Union?

A. No, sir, never have.

* * * * * * *

[fol. 63] Q. Mr. Gorgas, to your knowledge is there anything in either your Constitution or working rules or any

other rules governing your Local Organization, Local Union, that would prevent fellow iron workers from taking orders from a man where his foreman's rights were revoked?

A. I have never known anything in the Constitution or ever happened before. If a man does not take orders from a foreman, I know what they generally do, they just pay him off and get somebody else. That is part of your job.

Q. My question is where you know of anything in the documents that are governing your organization that would prevent a man from taking orders from him?

A. Not as far as the Union is concerned, no.

* * * * * * *

[fol. 65] Whereupon, the Plaintiff called LEON M. MCDANIEL, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Goldberg:

* * * * * * *

[fol. 66] Q. Mr. McDaniel, taking you back to 1953, were you employed as a boilermaker during the months of November, December, 1953?

A. Yeh.

Q. Were you a journeyman, a shop steward or foreman, or what?

A. Shop steward.

Q. Will you tell us what your duties were at that time?

A. Well, sort of go-between between the men, the company and business agent.

Q. And were you working on a job with Jake Perko at that time?

A. Yah.

Q. And what job was that, Mr. McDaniel?

A. Well, the William B. Pollock at U. S. Steel, Ohio Works.

Q. On that job you worked with Jake Perko?

A. Well, he was superintendent.

* * * * * * *

[fol. 72] Whereupon, the Plaintiff, JACOB PERKO, offered himself as a witness in his own behalf, and who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Goldberg:

Q. State your full name.
A. Jake Perko.
Q. Where do you live?
A. 39 River Street, Girard.
Q. How long have you lived in Girard, sir?
A. Well, my home been there about 50 years or more.
Q. And you came to this country from Finland?
A. Yes, sir.
Q. What year did you come here, sir? What year did you come to this country?
A. 1900.
Q. How old are you?
A. Seventy-three.
Q. Mr. Perko, how long have you been engaged in iron work?
[fol. 73] A. Over 50 years.
Q. Do you recall what year you started? Do you remember what year you first started working at iron work?
A. Yes, sir. I work 1902 for the Pollock Company.
Q. Yes, sir. Now, Mr. Perko, how many years have you worked for the Pollock Company exclusively?
A. About 12 years.
Q. And what was your job with the Pollock Company?
A. Well, mostly foreman, pusher or superintendent.
Q. Will you tell us what your job involved, what you had to do?
A. Well, after foreman, keeping the orders to the men, to craft.
Q. Mr. Perko, were you working for the Pollock Company in 1953?
A. Yes, sir.
Q. And what job were you working on?
A. Ohio Work, sir, hot blast stove at Ohio Works.

Q. What were you doing?

A. Superintendent.

Q. What did the work involve? What kind of work was it?

A. It was hot blast stove, plate work, boilermakers work.

Q. Was that you say at the Ohio Works?

A. Yes, sir; for U. S. Steel.

Q. Did you have any trouble on that job, Mr. Perko?

[fol. 74] A. Yes, sir.

Q. Will you tell us what the trouble was?

A. Iron workers trying to claim the boilermakers work and that was the dispute.

Q. Were you in charge of both boilermakers and iron workers on that job?

A. Yes, sir.

Q. Was there any other craft that you had on that job?

A. Yes, sir; five.

Q. What were the crafts?

A. Carpenters work part of the time; and also electricians work part time; then I had an operating engineer worked for time, as boilermakers and iron workers.

Q. And how many iron workers were on that job from its beginning to the end?

A. Well, the first start I had around about 15 iron workers and foreman.

Q. But then the work force would go up and down?

A. Yes, sir.

Q. Well, during the month of December, 1953, did you have any difficulty with the iron workers?

A. Yes, sir.

Q. Will you tell us in your own words what happened?

A. Well, when the iron workers come back to work, they refused to take my orders and instructions.

[fol. 75] Q. And what did you do about it, Mr. Perko?

A. Well, I had to take the matters up to my foreman and he had to come and give orders for the iron workers foreman.

Q. Who was that you are speaking of?

A. Francis Walsh.

Q. Mr. Perko, did you make any attempts to make things right with the Union with the iron workers?

A. Yes, sir.

Q. Who did you contact?

A. Well, I contacted with Mr. Thomas very much; and then I wrote to the International Local in St. Louis.

Q. And do you remember when you first saw Mr. Thomas about your trouble with the Union?

A. It was around December; it was around December, first part of December.

Q. First part of December?

A. Yes, sir.

Q. Where did you see Mr. Thomas, Mr. Perko?

A. Why, over at his office.

Q. And do you recall what you talked about with Mr. Thomas?

A. I told him, I say, "Why these iron workers don't take my orders and instructions?"

Q. What did Mr. Thomas tell you?

A. Mr. Thomas says, "They are not going to take you [fol. 76] instructions or any of you orders for the iron workers."

Q. Did he tell you why?

A. He say my foreman rights taken away.

Q. Did you see Mr. Thomas at any other time about getting your foreman's rights back?

A. I did a lot of time later, several times.

Q. Where did you see him on these other occasions?

A. Mostly always in his office.

Q. Did you do anything after seeing Mr. Thomas about trying to get your rights back?

A. Yes, sir; I hired a lawyer.

Q. Who was the lawyer you hired?

A. Mr. Newman.

Q. And what was the purpose of hiring him?

A. To get my rights back from the Union.

Q. Did Mr. Newman have any luck?

A. No, sir.

Q. Mr. Perko, did you try to get work with any company other than the Pollock Company after you were let off?

A. Yes, sir.

Q. Where did you go to get work?

A. I go to Pollock office, Pollock's office, after I was laid off.

Q. When were you laid off?

A. January 26, 1954; that is when they finished the job. [fol. 77] Q. Didn't the Pollock Company carry you for an extra month or so?

A. They carried me around five or six weeks on the payroll.

Q. But you weren't working during that time?

A. No, I was not working.

Q. During that period of time, were you doing anything to try and get straightened out with your Union?

A. Yes, sir.

Q. What were you doing?

A. Well, I trying to get—I was getting in contact with the business agent, Mr. Thomas.

Q. Did you do anything through the International? Did you make any attempt through the International office in St. Louis?

A. Well, I did wrote to them, yes, sir.

Q. Did they answer you?

A. Yes, sir. They said they going to look into it.

Q. Now, when you were laid off in February or when you left Pollock in February, did you go back during 1954 to try and get work?

A. Several times.

Q. And who did you see about getting work?

A. Mr. Walsh.

Q. And did you actually go back to work?

A. He had work for me; if I can get straightened up with [fol. 78] the Union.

Q. But actually, did you ever go back to work for the Pollock Company?

A. Yes, sir.

Q. No; that isn't what I am asking you. Did you ever go to work for the Pollock Company after you were left off in February?

A. No sir. No, sir.

Q. Did you try to get work there during 1955?

A. Yes, sir.

Q. Did you get work there?

A. No, sir.

Q. How about 1956?

A. I tried it; but they didn't have any result.

Q. How about 1957?

A. I done the same thing. I tried—I went there several times; but they could not hire me because my foreman's rights taken away.

Q. Did they indicate whether they had work available for you?

A. Yes, sir; they said they had work for me.

Q. Did you stop going or have you still been trying?

A. Well, in 1958, why, I kind of give up, because not any use; wasn't any use, because I trying all these years; and didn't have any results.

[fol. 79] Q. Mr. Perko, did you work for anybody following your discharge from the Pollock Company?

A. I work for it 1954; I work about a month and a half to Willputte Coke and Oven Corporation; but not the iron worker either—instruct work done in the coke ovens.

Q. Did you work for any other concerns then?

A. Yes, sir.

Q. Tell us what company.

A. I work for Niles Welding and Machine Company a couple of months; and that is in 1956; and I work about eight, nine weeks for Youngstown Steel Tank Company, 1957, first part of 1957.

Q. What kind of work were you doing with the Niles Welding Company?

A. I was fitting up in the shop.

Q. Tell us what that involves.

A. Simple—like machinery or mufflers for the airplanes and so on; assemble them, and prepare them ready for the welding.

Q. What sort of work were you doing for the Youngstown Steel Tank Company, Mr. Perko?

A. I fitting up tanks and so on; putting them together; and preparing the work for the welders.

Q. Mr. Perko, handing you what is marked Plaintiff's Exhibit 3, will you tell us if that is a photostatic copy of

[fol. 80] your tax return for the year 1950? It shows on the face what it is.

A. Right in here; isn't it—long time—

Q. Is that your signature?

A. Yes, sir, that is my signature.

Q. Will you look through these and see if your signature is on each of those sheets, please?

A. Yes, sir, that is my signature. Yes, sir.

Q. Is this your signature here?

A. Yes, sir.

Q. All right.

A. That is my signature.

Mr. Goldberg: I have some questions to ask about these. Do you want me to continue.

The Court: You may introduce them, if you want.

Mr. Goldberg: I'll like to introduce them; but I want to ask him some questions.

The Court: You can ask him questions after; there does not seem to be any question as to what they are.

Mr. Goldberg: No, sir.

The Court: They are received.

Q. Mr. Perko, looking at your return for 1950, how many companies did you work for that year, sir?

[fol. 81] A. This one company, William B. Pollock Company.

Q. What were your earnings that year, sir?

A. 10,137—isn't that it right there?

Q. That is right. Is that your total wages right there?

A. 10,000—

Q. No. That is what was withheld.

A. Total wages $6,832.08.

Q. All right. Now, handing you your return for 1951, that is this figure over here, will you tell us what your earnings were for 1951?

A. $11,519.98.

Q. How many companies did you work for that year?

A. Just one company.

Q. What company?

A. William B. Pollock Company.

Q. Handing you your return for 1952, will you tell us what your total earnings were for that year?

A. Is that a 12 or 13? Looks—

Q. Twelve.

A. $12,320.94.

Q. What company did you work for that year?

A. William B. Pollock.

Q. Any other company?

A. No, sir.

Q. And handing you your tax return for 1953, tell us [fol. 82] what company you worked for that year?

A. William B. Pollock Company.

Q. And what were your total earnings that year, sir?

A. $12,702.02.

Q. Handing you the return for 1954, Mr. Perko, tell us what companies you worked for that year?

A. I worked for William B. Pollock Company and also Willputte, a coke oven corporation, for a while.

Q. What were your total earnings for that year?

A. $2,579.61.

Q. Now, did you file a return for 1955?

A. No, sir; I didn't have any income.

Q. Handing you what is marked Plaintiff's Exhibit 3-F, is that your signature, sir?

A. Yes, sir.

Q. Is that your return for 1956?

A. Where is that; down here? Is that the two copies there together?

Q. Right here. That is the year. Tell us what companies you worked for that year?

A. William B. Pollock Company and Coke Oven Corporation; this is '54—'56?

Q. 1956. It says right on there what company you worked for.

A. 1956 I work for Niles Machine and Welding Company.

[fol. 83] Q. What was your total income for that year?

A. 1,500—no, that ain't the figure, is it, income figures?

Q. Right here.

A. Oh, yes. $1,165.87.

* * * * * * *

Q. Now, Mr. Perko, handing you what is marked as Plaintiff's Exhibit 3-G, is that your withholding statement for the last year you worked?

A. Yes, sir.

Q. What company did you work for that year, sir?

[fol. 84] A. The Youngstown Boiler and Tank Company.

Q. And what were your total earnings that year, sir?

A. $884.59.

Q. All right. That was for the year—

A. —1957.

Q. Fine. Thank you. Now, Mr. Perko, do you remember what date it was that the iron workers on this United States Steel job refused to take your orders? The first day.

A. December 4, 1953.

Q. Was that the date that the charges were filed against you also?

A. No, sir. The file was started December 8, 1953.

Q. Well, Mr. Perko, did the Union have a trial for you?

A. They did not try me; but I guess they tried the witnesses.

Q. Well, what date was this trial?

A. December 8, 1953, in the late in the evening.

Q. Where was it?

A. At the Union Hall, Mr. Thomas's office.

Q. And who tried you?

A. The executive board was in the meeting; Union Hall; Mr. Thomas's hall; and they put me out there in a meeting hall until the case was handled.

Q. Did anybody represent you, Mr. Perko?

A. No, sir.

[fol. 85] Q. Did you hear the witnesses testify against you?

A. No, sir; I was not in that room.

Q. Well, did they tell you what their decision was?

A. Yes, sir.

Q. Tell us what they told you.

A. When they call me in, Mr. Thomas told me, "Union find you guilty and set the fine on you $400, and $200 to be paid at once and $200 set back."

Q. Did you pay your fine?

A. I asked Mr. Thomas in the later days to take the certified check and he refused to take the check; so I didn't pay the fine. And then I asked him if he he'd take the cash and give me a receipt for it. He said, "No receipt; and this not going to bring to the foreman right back."

Q. Now, Mr. Perko, this took place on December 8, you say. Did you say this took place on December 8?

A. Yes, sir.

Q. 1953?

A. Yes, sir.

Q. How many times did you go back to see Mr. Thomas?

A. Oh, I went back to see several times after that; because I trying to get my foreman's rights back and go to work.

Q. And did Mr. Thomas tell you he would give you your foreman's rights back?

A. He said, "You never going to give any orders for iron [fol. 86] workers as long as I am running this Union."

Q. Now, these charges that were filed against you—

A. Yes, sir.

Q. —they were filed by five men. Now I am going to name them and I want you to tell me which one of these men were working on the job with you at the time these charges were filed; okay?

A. Yes, sir.

Q. Thomas Doyle?

A. He work for me.

Q. Leo Durkin?

A. He work for me.

Q. William Schoppy?

A. He work for me.

Q. Was he on the job with you when these charges were filed?

A. Yes, sir.

Q. W. S. Donitzen?

A. Yes, sir; he work for me.

Q. What about Bert Nock?

A. Whether Bert Nock—yes, he work for me.

Q. At the time that the charges were filed, were these men working for you?

A. Yes.

Q. Fine. Okay. Did you try, Mr. Perko, to obtain work [fol. 87] with any other company other than the Pollock Company?

A. Yes, sir. I had a chance to go and take a night turn for the American Bridge Company, Ohio Works, U. S. Steel, and they offer me a foreman's job if I could get straightened on the Union.

Q. Well, did you get straightened out?

A. No, sir.

Q. Did you go to work for the American Bridge Company?

A. No, sir; but I did went back because and told the foreman so I can't get straightened out. And he asked me to because I know the men in this part of the country and he was stranger to try and get him as a foreman be capable to handle the job.

Q. Mr. Perko, did you register with the Social Security Administration?

A. Yes, sir, I did.

Q. When did you do that?

A. Why, whether—the first part or whether it was the first part of 1952 or 1953, early part of the year.

Q. Mr. Perko, were you planning to retire at the time you registered with social security?

A. No, sir, I did not.

Q. Did you continue working after you registered with social security?

A. That is right.

[fol. 88] Mr. Goldberg: Thank you.

Cross examination.

By Mr. Green:

. . . . . .

[fol. 91] Q. In February of 1954, the company kept you on the payroll; did it not?

A. Yes, sir. 1954 they kept me on the payroll until some time in March.

Q. Some time in March?

A. Yes, sir.

Q. What was the last day that you did any work for the company?

A. January 26, 1954.

Q. Now, after you were laid off by the William B. Pollock Company, did you apply for work at the American Bridge Company?

A. I did after—yes, sir, I did.

Q. To whom at the American Bridge Company did you speak?

A. Mr. Lawson.

Q. Now, would I understand you to have said he promised you a job?

A. Yes, sir.

Q. Did you tell Mr. Lawson anything when you applied for the job?

A. Well, I was in his office; and they was looking for night foreman. And really, him and I, we got acquainted on that job at Ohio Works—first I know him; and he told me, asked me to take over night turn. And also his general [fol. 92] foreman was with him, Wayne—

Q. Now, when he asked you to take over as a night foreman, did you then go to work?

A. Well, because I thought maybe Mr. Thomas going to give my rights back if I were going to get away from the Pollock Company. That was my idea.

Q. It was your idea?

A. Maybe he would have give me my foreman's rights back if I get away from William B. Pollock Company.

Q. All right. Now did you talk to Mr. Lawson at all about your right to be a foreman?

A. Mr. Walsh?

Q. Lawson?

A. Oh, yes, sir.

Q. You did talk to him?

A. I did talk to him, yes.

Q. I am sorry. I didn't understand whether you said you did or did not talk to him; which did you say?

A. He knowed it. So I had a problem in the Union. He asked me if I can get my foreman's rights back so I can handle the job to take night turn foreman.

Q. Are you saying now that Mr. Lawson asked you whether you had your foreman's rights?

A. He knows I didn't have it.

Q. Well, how could that subject come up when you were [fol. 93] talking to him about a job?

A. Well, I was in his office; and because I know—he is looking for foreman; I heard it from outside, he looking for night foreman. He put on somebody on the job to take charge of the night turn and I guess didn't have experience. I heard he was looking for night foreman to take over; and so I went to see him.

Q. All right. But my question to you was how did the subject of your rights to be a foreman come up? Who brought up the subject?

A. He knows my problem; because we made—while I was at the Ohio Works I had my rights taken away. Him and I was talking every day to each other because our job side by side.

Q. Did you tell him that your foreman's rights were taken away?

A. Well, lot of time I guess we did. We talked nearly every day.

Q. And you think you are the person who told him that your rights were taken away?

A. Yes, sir.

Q. All right. Now do you recall the date that you spoke to Mr. Lawson? Do you remember the date that you spoke to Mr. Lawson?

A. No, I did not just exactly—I don't remember the date. For that was in the sometime summer, the early part [fol. 94] of the summer, and 1954.

Q. After you spoke to him that one time asking for the job, the night foreman, did you return to him?

A. Yes, sir.

Q. When did you return?

A. The same night, after I talked to Mr. Thomas. I went back the same evening, afternoon, and told him so I was refused the foreman's rights.

Q. You told Mr. Lawson that?

A. Yes, sir.

Q. And then what did Mr. Lawson tell you?

A. He said, "If you can't, get me a man that can understand the blast furnace."

Q. He asked you to get a blast-furnace man for him?

A. Yes, sir.

Q. Did you do that?

A. Well, I tried—I did; and everybody was working. So I didn't have any man living that I could recommend to him.

Q. Did you ask anybody else other than the American Bridge Company for a job?

A. Anybody else? Why, no. I didn't ask anybody else for American Bridge Company, because Lawson was doing the hiring.

Q. He did all the hiring for the company?

A. I think so, especially foremen.

[fol. 95] Q. Did you go to any other employers of iron workers and ask for a job in 1954?

A. Well, Joe Meyers was American Bridge Company union steward, and he was in the office at the time when I was talking to Mr. Lawson; and he was around anyhow sometime that day.

Q. Mr. Perko, I don't think you understood my question. My question is as follows: Did you apply for work with any employers other than the American Bridge Company in the year 1954?

A. Oh, yes, I did; William B. Pollock Company.

Q. All right. The William B. Pollock Company; American Bridge; any other?

A. Yes, sir. I went to see Mr. Kellogg, Coke Oven Corporation, general superintendent.

Q. What is the name of that company?

A. Willputte Coke Oven Corporation.

Q. And that is the company that gave you a job; is it not?

A. Yes, sir.

Q. All right. So you went to the Willputte Company in 1954 and obtained a job with them. How long did you work for Willputte?

A. Around about seven weeks; that job was finished.

Q. After you left the Willputte Company at the end of the seven week period, did you apply for any other work in 1954?

[fol. 96] A. I went back to Pollock.

Q. Anybody besides Pollock?

A. No; I don't remember.

Q. Do you remember that, that in April of 1954 you hired an attorney by the name of John Newman?

A. Yes, sir.

Q. Did you tell that attorney, Mr. Newman, that you had a chance to be hired by several companies as a foreman?

A. Well, I don't remember just what we talked about. Well, I had a big record in this district, and record all over the country. I was known; so I had a lot of chances to go to work for several companies when they needed.

Q. My question is, in April of 1954, what companies had offered you or promised that they would give you employment?

A. American Bridge Company and William B. Pollock Company; they offered me a job and also I went work Willputte Coke Oven Corporation, but not doing any iron work and doing any work at all. I just engineer erection —at collecting boxes over the coke batteries.

Q. All right. I think you testified that in the year 1955 you did not have any earnings at all; is that true?

A. I didn't work any '55.

Q. Not at all?

A. No, not drawing any wages.

Q. Not a penny of wages in 1955?

[fol. 97] A. Well, I don't know, not a penny. Now, that is so far back now; but I don't think I worked for any company 1955. I don't remember working any.

Q. Were you in town in 1955?

A. Most of the time; mostly always.

Q. In 1956, you applied for employment at the Niles Welding and Machine Company?

A. Yes, sir.

Q. And when you applied for employment, did you have to fill out a form telling them where you had looked before?

A. I did try to get—I was only lined up with the Pollock, William B. Pollock Company; but then I could go work with them on a construction, so I applied the job for the Niles Welding and Machine Company.

Q. When you applied for work at the Niles Welding and Machine Company, to whom did you apply? Who did you talk to about a job there?

A. Why, now they had a man, I can't remember his name, he was a superintendent; and after I worked there a couple of days, he quit and left and went to California for some big company in California. So I can't remember his name who he was that first hired me.

Q. Do you remember whether you had to fill out an application form?

A. Well, I filled the application form in—I filled the ap- [fol. 98] plication form in the office with the girl.

Q. And that form that you filled out with the girl, did you put on that form that you had been out of town for two years?

A. Been out of town?

Q. Did you put that on your application form?

A. I don't remember putting anything like that on. I don't remember.

Q. Do you remember how long you worked for the Niles Welding and Machine Company?

A. About 11 or 12 weeks.

Q. And did you give them a reason when you quit?

A. Why, they was—the time I quit, there was a man named Rawlings, and he was the superintendent at the time; and work was getting slack, they was laying the mens off, they laying the men off; they laid the night turn and pretty near all of it off; and I was a newest fitter or one of the newest men on the day turn; and when him and I would talk he said I was on my way out in the next day or two; even asked me if I was lined up with any kind of work.

Q. Well, what reason did you give the company for quitting?

A. Well, I told them this way, I said, "Now if I going to get laid off in a short time, no use of me to try to draw my social security over—my—over 12 hundred over, because I going to be laid off right away."

Q. Did you tell the company that you were retiring and [fol. 99] were going to draw social security benefits?

A. No, sir, I did not tell them I going to retire.

Q. You did not tell them?

A. No, sir.

* * * * * * *

[fol. 101] Q. All right. Now, when you registered with social security, were you advised that you could earn up

to $1,200 a year without affecting your social security benefits?

A. Well, because if I didn't have a job so I could have stayed to work; I'd have kept on working.

Q. But did you hear my question?

A. No, I didn't hear plain enough.

Q. Were you advised when you went to register for social security benefits that you could earn up to $1,200 a year?

A. No, not that time. The law was different when I applied for social security. The law was all together different. That been changed later; sometime you was off and didn't make $50 or over, over $50; you could apply social security benefits.

Q. In 1956, did you work for a company?

A. 1956; yes, sir.

Q. What was the name of that company?

A. Niles Machine and Welding Company.

Q. In 1957, did you work for anyone?

A. Youngstown Boiler and Tank Company.

Q. How long did you work for the Youngstown Boiler and Tank—

A. About in the neighborhood of eight or nine weeks. [fol. 102] Q. And how much did you earn in that period of time?

A. Around about $800 or something in that neighborhood of $800.

Q. Did you quit that job?

A. Yes, sir.

Q. There was work for you; had you wanted to continue to work?

A. Well, I had to work steady night turn; and my wife was in not feeling well; and I could not get any help to stay with her, and she could get along a little better in day times; and I had to work steady night turn. So I had to quit.

Q. So you had to quit. Did you look for any work after you left the Youngstown Tank Company?

A. Yes, sir. I always looked for work William B. Pollock Company.

Q. Always at the William B. Pollock Company?

A. That is right.

Q. Did you ask any other contractors that used iron workers or boilermakers for work?

A. No; was not no use, because I didn't have any rights to work.

Q. Did any employer tell you that he would not hire you, beside the William B. Pollock Company, because you did not have foreman's rights?

A. Yes, sir. American Bridge Company. They say they [fol. 103] could not hire me because I didn't have foreman's rights.

Q. American Bridge Company told you that?

A. Yes, sir.

Q. And the William B. Pollock Company told you that?

A. Same thing. They told me they can't handle me because I can't give any orders to workers.

Q. Did any other companies tell you?

A. No. Because I don't think I did apply any job anybody else.

Q. You didn't apply for work with anybody else?

A. Not for construction work I didn't.

Q. Now, is this true then, that during the years 1954, 1955, 1956 and 1957, you did not apply for work with a construction contractor other than the William B. Pollock Company and in the year 1954, the American Bridge Company; is that right?

A. 1954. I don't think I—I don't remember if I did.

Q. You will recall at the last trial I asked you about your lawn furniture business then too; did I not? Do you recall that?

A. Maybe you did; now I am not quite sure.

Q. Well, will this refresh your memory: (Reading) "Question: And you were also engaged in the lawn furniture business, weren't you? You made lawn furniture? Answer: Yes; I had that work at home." Do you remember [fol. 104] that? "Question: You had equipment to make lawn furniture which you sold? Answer: I had a hand saw and a hammer and small tools and equipment. Question: And you were making lawn furniture during what year?

Answer: Well, I made it in '56 and '57. I just made a few of them for myself and my families most of all. Question: And you sold some? Answer: I sold some of them, yes. Question: That is right. Did you say anything about your sales in your income tax? Answer: I didn't make the sales absolutely sales, not absolutely a sales, any; I mostly give them away. Question: Oh, you were giving away lawn furniture? Answer: Mostly. Question: You didn't report anything you would get in the lawn furniture business to Uncle Sam; did you? Answer: I only made a few chairs for a past-time and give it away to my families."

Q. Do you remember that?

A. I remember we had some talk about it.

Q. And the statements that you made at that time that you did make some sales, is that correct?

A. I haven't make very many sales.

Q. You did not make many sales?

A. No, sir.

Q. But you did make some?

A. I did make some; I got one in my backyard now.

Q. And you also recall that during that same trial I asked you whether you had any earnings in the year 1955; and [fol. 105] you recall that you earned about a thousand dollars in 1955. Do you remember that?

A. No, sir; I can't see where I earned a thousand dollars; because I was not working.

. . . . . .

Q. Mr. Perko, you were advised by the International Union sometime in 1954, by April of 1954, that it was all right for you to pay your dues in the Union?

A. I paid my dues sometime first part of it, first part of 1954, and I paid up till the first day of April.

Q. So you were in good standing through the first day of April of 1954?

A. I was in good standing, yes, sir.

Q. The Union had accepted your dues in April?

A. They did.

Q. And there was no question about your membership at [fol. 106] that time in the Union, was there?

A. They was some questions, but they accepted my dues.

Q. They did accept your dues. Now after you paid your dues, did you go out and look for work?

A. Why, William B. Pollock Company, yes, sir.

* * * * * * * *

[fol. 107] Whereupon, the Plaintiff called Attorney JOHN M. NEWMAN, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Goldberg:

Q. State your full name, please?

A. John M. Newman.

Q. And what is your profession, sir?

A. I am a lawyer.

Q. Practicing here in Youngstown?

A. Yes, sir.

Q. Where is your office, Attorney Newman?

A. In the Union Bank Building.

Q. Mr. Newman, taking you back to the year 1953, 1954, were you retained by Mr. Jake Perko during that period of time?

A. I was. I think that it was in the early part of 1954.

Q. Can you tell us what the purpose of Mr. Perko's hiring you was for?

A. Yes.

The Witness: Your Honor, this is a matter of privilege; [fol. 108] and I presume since I have been called the privilege is waived. I'd like the record to show that.

The Court: Yes, it will.

A. Yes; he engaged me because he had some difficulty with the Structural Iron Workers Union.

Q. Did you do some work for him on that particular problem?

A. Yes, sir.

Q. And do you recall what you did for him, Mr. Newman?

A. Well, I had a number of conferences with him, and my recollection is that I wrote one or two letters, and I had at least one conference, I know, with Attorney Gene Green.

Q. Were you successful in straightening out Mr. Perko's problem?

A. Not to Mr. Perko's satisfaction, no.

Q. Well, was Mr. Perko attempting to get work while you were being retained by him?

A. So he advised me, yes.

Q. Did you make any efforts to get him straightened out by negotiating with his Union?

A. I did.

Q. Mr. Newman, handing you what is a carbon copy of a letter dated May 14, 1954, can you identify the signature on that, sir?

A. Yes, sir; that is my signature.

[fol. 109] Q. And that is a letter that you wrote on behalf of Jake Perko?

A. This is a copy of the letter, yes, sir, that I wrote.

Q. And this letter was prepared in your office?

A. Yes, sir. May I see that again, please? Yes, sir; I was looking at the legend down there on the left.

Q. And to your knowledge was it placed in an envelope and sealed?

A. It was.

Q. Stamped?

A. Well, may I say that it went through the normal procedure in our office, which would be that I dictated it, it came to my desk, it was signed, I gave it back to the secretary and in the ordinary course of the office procedure, which I have nothing to do with, of course, it would have been sealed, stamped and sent into the mail that evening.

Q. Did you ever receive an acknowledgment of the receipt of this letter?

A. I did not.

Q. Was the letter returned to your office?

A. It was not.

Q. Attorney Newman, would you be good enough to read the contents of that letter.

A. This is addressed to: "William Thomas, Business Agent, Structural Iron Workers, Local 207, 651 Market [fol. 110] Street, Youngstown, Ohio. Dear Sir: We represent Mr. Jacob Perko of Girard who is a member of your union and with whom you are personally familiar, I believe. Mr. Perko has available to him several job opportunities as a foreman in connection with structural iron work. I am sure that Mr. Perko being a dues paying mem-

ber of your organization is free to accept any of these jobs. Would you kindly advise me on behalf of Mr. Perko that there is no constitutional objection to Mr. Perko's filling one of these "foreman" or "pushers" jobs in order that Mr. Perko shall have at hand the answer to this question in the event it should be asked by the employer. Very truly yours," with my signature.

Q. To this letter you never received a response?

A. I did not.

Q. Did you have any conferences with Mr. Perko following this date?

A. I can't remember definitely, but my suspicion would be that I did. I know I wrote him subsequently a letter.

Q. You wrote a letter on behalf of Mr. Perko?

A. I wrote a letter to Mr. Perko subsequent to this.

Q. Did Mr. Perko indicate to you at any time following the sending of this letter that he had taken a job or was given the opportunity for a job or his foreman's rights had been straightened out?

A. He did not.

[fol. 111] Mr. Goldberg: I believe that is all. I would like to offer this into evidence, Your Honor.

The Court: Wait until Mr. Green cross examines the witness.

Cross examination.

By Mr. Green:

Q. Mr. Newman, you and I have corresponded about this matter before you wrote that letter in May of 1954?

A. May of 1954.

Q. When you first consulted me, isn't it true that you were concerned about a fine that had been imposed by the Local Union against Mr. Perko?

A. That is correct.

Q. And in our discussions we did not talk at all about his right to be a foreman?

A. No, we did not; because he was not a Union member at that time even.

Q. Your understanding was that he was appealing from a fine that had been leveled; am I correct?

A. That is correct.

Q. He had appealed to the International Union?

A. That is correct.

Q. The International Union then advised that his fine had been suspended; is that not correct?

[fol. 112] A. That is correct.

Q. You inquired of me as to whether the Union would accept his dues after they had been notified by the International Union that the fine would be suspended?

A. Yes, sir.

Q. And then I advised you that the Union would?

A. That is correct.

Q. Accept the dues. And I assume you instructed Mr. Perko to pay it?

A. That is correct.

Q. Did he advise you that he had paid it?

A. Yes, he did.

Q. Did he advise you further that he had gone out and sought employment after he had paid his dues?

A. My recollection on that is that he did. I can't say definitely that I had conversations with him about specific job opportunities; but my recollection is that I did discuss this with him, and he indicated to me that jobs were not available to him even after he had paid his dues.

Q. Now, when you say he indicated to you that jobs were not available, do you have any recollection as to what reason he gave for not being able to obtain employment?

A. Yes. He told me that the other Union men, if he was on the job, would not work.

Q. And as he explained that to you, or stated that to you, [fol. 113] did he give you any instances in which this had occurred where other Union men refused to work with him?

A. Subsequent to the time of the payment of these dues, I think not.

Q. He did refer to the one instance that occurred while he was working for the William B. Pollock Company in December of 1953?

A. At Briar Hill?

Q. Yes.

A. At the Ohio Works, yes.

Q. That was the one instance?

A. That is correct.

Q. That occurred in December. Did he advise you of that?

A. He advised me of that. He advised me, as I recall, that Mr. Thomas had told the men not to work if he was going to be the foreman.

Q. Mr. Thomas?

A. That is correct.

Q. Did you as his attorney feel called upon to go out and make any independent investigation of your own?

A. I don't quite understand the purpose of the question.

Q. Let me—

A. I did not make any independent investigation.

Q. And in representing your client, you accepted the [fol. 114] word of your client as being the truth?

A. I did.

Q. And it was on the basis of what he told you that you engaged in the correspondence which you did engage in?

A. That is correct.

Q. And it was on the basis of what he told you that you conferred with me about this matter?

A. That is correct.

Q. And it is also true that our discussions at no time did we ever talk about his right to be a foreman?

A. No. If you recall, I advised you what the situation was, and realizing that under the rules of the organization he apparently had been suspended and had been fined, I felt that the first thing to do was to have that situation corrected within the Union organization before anything further could be done; which was the reason why I got in touch with you and then subsequently the reason why I wrote to Mr. Thomas whom I didn't know and still do not know because I have never met him, hoping that he would correspond with me and indicate to me in writing that the situation was entirely clarified and there was no further problem involved. If this were in writing, I would have felt my job would have been accomplished. This could have been presented to a possible employer.

Q. Mr. Newman, while you were representing Mr. Perko, you were not aware of the fact that in this Union a member [fol. 115] is not suspended from the Union until he has been delinquent in dues payments for a full year? You are not aware of that fact?

A. I was not aware of that. I was only aware of the fact of what Mr. Perko had told me and that I felt the situation should be straightened out with the National Organization.

Q. And steps to straighten out his difficulties, if any, with the Local Union were taken with the International?

A. Yes.

Q. And the International was advised that a fine had been imposed and that is all?

A. That is correct.

Q. Isn't this true, that Mr. Perko advised you that the Union refused to accept dues until he paid his fine?

A. That is correct; yes.

Q. And it was then the question of whether he had to pay the fine before he would pay any further dues?

A. I think that is correct.

Q. So the communication to the International, they sent in a representative, so they advised you, advised Mr. Perko?

A. They never advised me they had sent in any representative. My recollection is that Mr. Perko himself wrote to the International in connection with an appeal, let us say, to the International from this action; and he subsequently received a reply from the International Union saying that the fine had been suspended and that he was on probation for some period of time.

[fol. 116] Q. And it was then he paid his dues?

A. Yes, sir. Then he was able to pay his dues, so he told me. They would not accept it beforehand.

Mr. Green: All right. Thank you.

Redirect examination.

By Mr. Goldberg:

Q. Attorney Newman, you were not hired to prosecute the appeal for Jake's fine, were you?

A. No, sir.

Q. The purpose of your employment was to straighten out his foreman's rights?

A. That is correct.

Q. And do you recall whether or not Jake discussed with you at any time following this letter of May 14, following that date, whether he discussed with you his problem about his foreman's rights.

A. When you say do I recall, can't recall a specific conversation; but I do know that he continued to insist that he could not obtain employment even *after he had restored to* his Union rights.

Q. You mean even after he paid his dues he was still unable to get work as a foreman?

A. That is what he told me.

[fol. 117] Q. One more thing. Mr. Green asked you about independent investigation. You were satisfied that Mr. Perko was telling the truth?

A. Oh, I was, yes.

Mr. Goldberg: That is all.

Mr. Green: That is all.

The Court: Thank you.

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Jacob Perko, resumed the stand and testified further, as follows:

Further cross examination.

By Mr. Green:

. . . . . .

[fol. 119] Q. Did you receive anything from the Union in writing about the nature of the penalty that was imposed on you by the Union after the hearing on December 8, 1953?

A. In the writing?

Q. In writing. Did the Union give you anything in writing?

A. No. I did come from headquarters this Union here did not give me anything in writing. I can't remember it.

. . . . . .

[fol. 124] Q. When was the last time that you were back to see the Union, any representative of the Union, about your rights to be a foreman?

A. Well, I think it is around there '57, 1957.

Q. Who did you see in 1957?

[fol. 125] A. I always talk to the girl in there, and—the clerk, and Mr. Thomas.

Q. Mr. Thomas and the girl. Now the girl that you refer to is the secretary of the Union, the paid secretary?

A. Yes, sir.

Q. She occupies an office by herself?

A. That is right.

Q. And that is where you pay your dues?

A. Yes, sir.

Q. She is the one that give you a receipt when you pay your dues?

A. She gives a stamp, yes, sir; puts a stamp on the book.

Q. She is the one you say you talked to in 1957?

A. Well, now them is the only ones I talked to that they concerned the Union; the girl and Mr. Thomas.

Q. Just the two of them?

A. I don't just exactly remember what I was talking to in 1957 to her or not, but I know her; I know I talked to Mr. Thomas about Union rights.

Q. In 1957?

A. Yes; sometime in 1957.

Q. Do you have any part of the year of 1957?

A. Well, it could happen many times, quite a few times; I always want to get my foreman's rights back because I have my job ready to go on whenever I got straightened out.

[fol. 126] Q. Mr. Perko, I didn't ask you what could have happened. I am asking you when did it happen in 1957?

A. I can't give you the date.

Q. Would you know whether it was in the winter of 1957?

A. Well, I can't remember; but I was going every off and on.

Q. Do you remember whether you went in the spring of 1957?

A. Well, I just went in the spring and I went in the middle of the summer and I went later.

Q. Are you saying you went there a number of times in 1957?

A. Well, every once in while, yes—

Q. Well, Mr. Perko, when you say once in a while, how often is once in a while?

A. Well, I am looking for my rights back to go to work; and I trying to get my rights back. So that is the reason I went there often to trying to get ahold of him and get my rights straightened out.

* * * * * * *

[fol. 129] Whereupon, the Defendant called EUGENE ROBERTS, who, being first duly sworn, testified as follows:

Cross examination.

By Mr. Goldberg:

Q. State your name.

A. Eugene Roberts.

Q. Where do you live?

A. 1516 Kensington.

Q. What is your occupation?

A. Iron worker.

Q. How long have you been an iron-worker?

A. Going on my 20 years.

Q. Are you a member of the executive board, Mr. Roberts?

A. I am.

Q. How long have you been a member of the executive board?

A. Two years; it will be two years this June.

Q. Were you an officer of the Union during the time that Jake Perko was tried—

A. I was.

[fol. 130] Q. What was your status?

A. Board member.

Q. You were a board member at that time?

A. At that time, yes, sir.

Q. I thought it was 1953?

A. I didn't run for several terms, and I got re-elected.

Q. But at the time that Jake Perko was tried, you were a member of the executive board that tried him?

A. I was.

Q. And, Mr. Roberts, would you be good enough to tell me what the function of the executive board is for that Union?

A. Well, procedure is that there is an infraction; members that are in it, they write out the charges; it is presented to the board or to the president, and he gives it consideration; then he will send a registered letter to the one being charged. Then he appears before the executive board, and they question him.

Q. Now, are records kept of these meetings of the executive board?

A. There are minutes kept, yes.

Q. Who usually keeps the minutes or who did at that time?

A. I believe it was McCarthy; he is dead now.

Q. He is dead now. Did he have an official designation as a recording secretary or anything?

A. He was elected to that office.

[fol. 131] Q. Was he paid for the work he did as recording secretary?

A. I think he got $25 a month to take care of pencils and papers and stuff like that.

Q. Well, what were his duties as recording secretary?

A. Well, he would keep the minutes of the meetings.

Q. And did he keep minutes of every meeting that the executive board had?

A. To my recollection, he did, yes.

Q. And may I see the books, please. Did Mr. McCarthy record the business activities and transactions as they went on at these executive board meetings in the minutes?

A. In the board minutes he kept the record, yes.

Q. In substance, he would record every important piece of business; is that right?

A. As far as I know, yes.

Q. Well, there was no important business that didn't show in the books, was there?

A. Not that I know of.

Q. I went through the minute book once before and I didn't see anything in here about Jake Perko's foreman rights taken—

A. Couldn't be. They were never taken away.

Q. Would they be taken away?

A. They can't be taken away. You can't put anything—

Q. I am saying, if Mr. Perko's rights were revoked would [fol. 132] they appear in the minute book?

Mr. Green: Object.

The Court: Sustained. The minute book is here. It will speak for itself.

Q. Mr. Roberts, you stated a moment ago to the best of your knowledge all the important business transactions by the executive board goes into this minute book, is that right?

A. That is right.

Q. You are absolutely sure of that?

A. Well, that is his job.

Q. But as far as you know, everything, there is no secret business that is kept out of this book?

A. No secret business kept out.

Q. Mr. Roberts, handing you what is marked as Plaintiff's Exhibit 5, are you familiar with that document, sir?

The Court: He is not asking you to read it all.

A. I know; but I don't recollect it.

Q. Do you recognize your signature, sir?

A. Yes, I recognize.

Q. That is your signature?

A. That is my signature.

Q. Well, I have a photostatic copy; you can look at this while I quote some portions of it to you: "To Whom It May Concern, This is to certify that there appeared before me [fol. 133] one Eugene Roberts who being first duly sworn deposes and says he is a member of Local 207 Structural Iron Workers and is also a member of the Local executive board."

Q. Now, in 1955, were you a member of the executive board, Mr. Roberts?

A. I don't know whether I was at that time or not; I could not say; I don't know when my term expired.

Q. "He further states he has served as a member of the executive board for about four years and that many times during meetings of the executive board that the business agent requested matters being discussed which were the business of the Local Union be 'kept off the record', principally the wage agreement of June 1, 1954 to May 1, 1955."

Q. Do you recall making that statement, sir?

A. No, I don't.

Q. Well, look at Page 2, if you will—

A. Well, it is here, but I don't recall making it.

Q. Do you recall that you and Mr. James Corbett objected to the manner in which the negotiations were being carried out concerning this agreement which you signed a statement to?

A. I just can't recall which agreement you are talking about at the time.

Q. Look at Page 3, Mr. Roberts, toward the bottom. Do you recall signing at the end of the entire statement in which this portion was on Page 3: "The foregoing action [fol. 134] did not appear on the records of the executive board as was demanded by Thomas."

Q. Do you recall that, sir?

A. What page are you on, sir?

Q. Page 3.

A. And whereabouts?

Q. Third paragraph from the bottom, fourth paragraph from the bottom.

A. That is at the top then.

Q. The bottom.

A. You said fourth from the bottom.

Q. That is correct.

A. There is only four; so it must be the top one.

Q. Read that, please. (Indicating) Read it aloud.

A. "The foregoing action did not appear on the records of the executive board as was demanded by Thomas."

Q. Now look at the last page, sir. The last page. Is that your signature?

A. That is my signature, I said.

Q. And will you tell us what appears beneath that?

A. "Before me a notary public in and for said County and State personally appeared Eugene Roberts who acknowledged this to be his free act and deed."

Q. And that is signed by whom, sir?

A. Robert L. Tatman.

Q. Do you know Attorney Robert Tatman?

[fol. 135] A. No, I don't.

Mr. Goldberg: That is all, Mr. Roberts. I offer this into evidence, Your Honor.

* * * * * * * *

[fol. 137] Whereupon, the Defendants called WILLIAM THOMAS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. State your name.
A. William Thomas.
Q. Where do you reside?
A. 6180 Sodom-Hutchings Road, Girard, Ohio.
Q. How long have you lived in Girard?
A. Practically all my life.
Q. What is your occupation?
A. I am the business representative of the Structural Iron Workers Local 207, Youngstown, Ohio.
Q. How long have you been business representative for Local 207?
A. Approximately 12 years.
Q. How did you obtain the position of business representative?
A. I am an elected officer.

* * * * * * * *

[fol. 138] Q. Will you tell us who was eligible for membership in Local Union 207?
A. Well, anyone that solicits the organization to become a member and passes a qualified test.
Q. What kind of work is performed by the members of Local 207?
A. It is the erection of structural buildings, bridges, towers, blast furnaces, and mill work.
Q. What are your duties as business agent for Local Union 207?
A. Well, I am the recognized agent to the employer and the general public at jurisdictional disputes to see that our people do get the work that is coming to them.

Q. Does your Union enter into collective bargaining agreements with employers?

A. We do.

Q. And how often do you enter into such collective bargaining agreements?

A. Well, they vary. Sometimes it is a one-year contract; and has run as high as a three-year contract.

[fol. 139] Q. Will you name the employers with whom you engage in collective bargaining?

A. They are the Steel Erectors Chapter of the Builders Association who consists of T. Bruce Campbell Construction Company, William B. Pollock Company, Matt S. Connell, Pilarusso Construction Company, The Federal Iron Company, The Hunter Construction Company, and General Riggers and Erectors.

Q. All of those companies that you have named enter into signed collective bargaining agreements with you?

A. They have.

Q. The collective bargaining agreements contain what provisions, generally?

A. Well, it is mostly the working rules and the jurisdiction of the work and the wage structure.

Q. That is, by wage structure you mean rates of pay to members that are represented by your Union?

A. Yes, sir.

Q. And in 1953, was the William B. Pollock Company a signatory to a collective bargaining agreement with your Union?

A. Yes, they was.

Q. Mr. Thomas, I hand you a document which has been identified for record purposes as Defendant Exhibit No. 2. Can you identify that document?

A. Yes, sir, I do.

Q. What is it?

[fol. 140] A. It is a copy of our contract with the Steel Erectors Chapter of the Mahoning Valley.

Q. The William B. Pollock Company, I think you testified, is a member of that Chapter?

A. They are.

Q. For what year, years, is that agreement covered?

A. That agreement goes into effect on May 1, 1953, and will be in effect until midnight, April 30, 1954.

Q. This then was the agreement that was in effect during the December period of 1953, between your Union and the William B. Pollock Company?

A. It is.

Q. Is there any provision of that collective bargaining agreement which defines the work that will be assigned to members of your Union?

A. Yes, sir, there is.

Q. What provision is that?

A. It is Jurisdiction of Work, the heading.

The Court: He means the number.

The Witness: Section 1.

Q. Section 1, entitled Jurisdiction of Work?

A. Yes, sir.

Q. Does that have any reference in jurisdiction of work to work on blast furnaces?

A. Yes, it does. It spells it out very plainly.

[fol. 141] Q. Does it have any reference to work on stoves in the steel mills?

A. It does.

Q. Does it provide for the assignment of such work to members of your Union?

A. Yes, it does. It says, "The contractor agrees to engage iron workers on the following work:".

Q. Now, in addition to the assignment of work, what provisions of the contract spell out the wages that are to be paid to the men engaged in the work?

A. That would be Section 7, under Wage Rates.

Q. What wage categories are specified in that collective bargaining agreement?

A. It says, "The wage rate for employees shall be as follows: Foreman, $3.34½ per hour; Journeyman, $3.03½ per hour; Sheeter shall receive 25 cents per hour above the journeyman iron worker wage and the sheeter's bucker-up shall be paid 12½ cents per hour above the journeyman iron worker wage."

Q. Is there anything in that collective bargaining agreement which provides for the wages that are to be paid to a job superintendent?

A. No, there isn't.

Q. Is there anything in that agreement which provides that the Union has a right to determine who may be a job superintendent?

[fol. 142] A. No, there is not.

Q. Is there anything in that agreement which gives the Union a right to determine who may be a job foreman?

A. There is not.

Q. Will you tell us what is the practice within the industry by employers in selecting their foreman?

A. Well, the employer selects all of his supervision, whether he be foreman, general foreman or superintendent.

Q. Now specifically, getting to the William B. Pollock Company, have you as business agent for Local 207 had occasion to discuss problems that have arisen under that collective bargaining agreement which you have before you with representatives of that company?

A. At no time have I ever discussed that problem with the William B. Pollock Company?

Q. Have you discussed any problems that have arisen under that contract with the William B. Pollock Company?

A. You mean differences of opinion with William B. Pollock Company and the Union?

Q. Yes.

A. No.

Q. You have not had any discussions with the company?

A. Just in jurisdictional disputes.

Q. All right. You did have jurisdictional disputes during the year 1953?

[fol. 143] A. Many of them.

Q. And with whom were those jurisdictional disputes?

A. The boilermakers.

Q. What was the nature of the dispute?

A. Well, over the erection of blast furnaces and stoves.

Q. Will you explain what gave rise to a dispute between the boilermakers Union and yours?

A. Well, as it has been stated here, for a period of 20 odd years the iron workers in the locality of Youngstown, Ohio, had erected all stove and all furnaces because there was no boilermakers in this locality. The closest boiler-

maker representatives would be in the city of Pittsburgh and the city of Cleveland, Ohio.

Q. When did the boilermakers begin to assert their right to work on stoves and blast furnaces in this area?

A. About the year of 1950.

Q. Did the boilermakers assert their right to do work for the William B. Pollock Company on blast furnaces and stoves during the life of that collective bargaining agreement?

A. They did.

Q. Do you recall any of the instances in which they made such assertions?

A. Oh, yes. We was picketed a number of times by the boilermakers while in the employment of the William B. Pollock Company.

[fol. 144] Q. All right. Now when the boilermaker would picket a job, do you recall any jobs in particular that they picketed during 1953 and '54?

A. One job was at the Republic Steel in Youngstown, Ohio, Center Street.

Q. Was that job being performed by the William B. Pollock Company?

A. It was; and one job in Warren, Ohio, at the Republic Steel Company.

Q. Also being performed by the William B. Pollock Company?

A. Yes, sir.

Q. Pickets were established by the boilermakers Union?

A. They were.

Q. Did the iron workers engage in any picketing activities during 1953 or 1954 at the William B. Pollock Company?

A. We have never engaged in picketing with any dispute pertaining to the boilermakers.

Q. How were the disputes that arose over the assignment of men to work on the stoves and blast furnaces resolved by the William B. Pollock Company and the Union involved?

A. Well, the disputes become so numerous that they was a local labor management committee established in the City of Youngstown, and to try and iron out these jurisdictions;

these problems was submitted to that committee. That committee was picked very carefully of a group of equal [fol. 145] numbers of management and labor; and many times we appeared before this committee.

Q. Now, when you would appear before this committee on the question of what crafts should be assigned to work, would agreements be made by the participants as to whether they would abide by the decision of the committee?

A. Yes. This committee functioned very well; because both representatives of both crafts had to agree that we would abide by the decision of the committee before they would process your complaint.

Q. In December or late November of 1953, did a jurisdictional dispute occur between the boilermakers and iron workers which was referred to the labor management committee?

A. Well, there were numerous disputes at that time. I remember one so clearly. This agreement was worded that whoever had the majority of the work on the project would man and erect all hoisting or lifting equipment. That did not seem to be clear enough; so it was finally broken down to a man-hour basis, if I remember clearly. It was hard to define who was going to have the majority of the work on the job; because about the only way that that could be determined would be by the number of men that was employed on the job, the greater number of each side.

Q. Specifically now, in December or November of 1953, was a dispute submitted to the labor management committee over who was to man the rigs at the Ohio Works plant of the U. S. Steel Company?

[fol. 146] A. Yes, sir, there was.

Q. Can you tell us what the circumstances were that gave rise to the submission of that dispute to the labor management committee?

A. Yes, sir. They was a stove to be torn down. This stove was to be entirely dismantled in the manner prescribed. The William B. Pollock Company employed iron workers to dismantle this stove in its entirety. That meant that we had to go in and erect all the lifting equipment and dismantle the stove. Then they was to be a new stove erected on that particular site. Well, due to a decision of

this same committee two months prior to that, our people made a claim on the hoisting of the material of this stove only. When I say that, I mean only the hoisting of the material; and, of course, that brought us back into another disagreement. The company at that time did shut the job down. The two International representatives come in and met with the Local agent, myself, and representatives of the Pollock Company; and we all agreed that that job should continue until we got the decision of the labor management committee. That job did start immediately; and I think it lasted approximately three, four, five days, something like that. And the decision of the local labor management committee was that the lifting of that particular material was given to the boilermakers. And upon that decision being rendered, I immediately contacted our people and had an orderly withdrawal of our members from that project.

[fol. 147] Q. Were minutes kept of the proceedings before the labor management committee?

A. Yes, there were.

Q. Do you recall who kept the minutes?

A. I don't think that I can—

Q. Mr. Thomas, I hand you a document that is identified for record purposes as Defendant Exhibit No. 3, entitled, "Minutes of the Meeting of the Iron Workers and Boilermakers, Thursday, December 3, 1953." I will ask you if you recognize that document?

A. Glancing at this I would say that I do recognize it.

Q. And what is that document?

A. Well, it is the minutes of the meeting of the iron workers and boilermakers; it is between the representatives of the William B. Pollock Company, representatives of the International Iron Workers, and myself; and representatives of the International Boilermakers Union and Local representative.

Q. Where did that meeting take place?

A. This meeting took place at 211 North Champion Street, Youngstown, Ohio.

Q. 211 North Champion, Youngstown, is the address of what organization?

A. That is at the Mahoning Valley Builders Association.

Q. William B. Pollock Company is a member of the Mahoning Valley Builders Association?

[fol. 148] A. They are.

Q. At that meeting was the issue discussed as to which craft should be assigned to the erection of the stove?

A. Yes, it was.

Q. Were those minutes reflected that a decision was arrived at that meeting?

A. Well, it is rather lengthy; I would say that about the only decision that I remember arriving out of this meeting was that the two Internationals agreed with the Local agent and William B. Pollock Company that this job would start up as the company had shut it down.

Q. Does that mean that the iron workers were to man the rigs?

A. It did.

Q. Was it also agreed at that meeting that the matter was to be submitted to the full labor management committee of this area?

A. Yes, sir.

Q. Now, I hand you a document which has been marked and identified for record purposes as Defendant Exhibit 4, entitled, "Minutes of the Meeting of the Labor Management Committee, Friday, December 11, 12:00 Noon, Colonial House." Do you recognize that one?

A. Yes, I do.

Q. And what is it?

[fol. 149] A. I believe that this is the final decision that was given on that job.

Q. Do those minutes reflect who made the decision?

A. Yes, it does. It gives the representatives. Representing management is George J. Shutrump, chairman; Dale Witcraft; G. G. McElhaney; and Jack Parish.

* * * * * * *

[fol. 150] Q. Had you at any time prior to the receipt of that decision from the labor management committee given any instructions to the men who worked on the stove job [fol. 151] on the rig concerning their right to work with Mr. Perko?

A. No, I had not. In fact, I could not establish the fact that Mr. Perko was superintendent on that job at that time.

Q. You say by not being able to establish it, you didn't know he was superintendent on the job?

A. No, I did not.

Q. Had you been in contact with the men on the job concerning who they were to take orders from at any time during the months of November and December?

A. No, sir, I didn't.

Q. When did you first learn that the men on the job were complaining about Mr. Perko?

A. Well, I just got it from word of mouth and more from the steward and the men on the job that they would not take orders from him.

Q. When did they tell you?

A. Well, this was after they was laid off, after the 6th day.

Q. After the 6th day of what?

A. After their 6th day of employment on this rig; after they had been re-assigned this job to complete it until after the labor management decision.

Q. That is when you first heard of it?

A. I would say that would be the first instance that I heard of it.

[fol. 152] Q. All right. Now had you known Jake Perko before this time?

A. Yes; I have known Jake Perko for many years.

Q. And had you been required or had you been any time during the course of your duties as business representative for the Union spoken to any employer about Jake Perko?

A. Would you repeat that?

Q. Had you spoken to any employer about Jake Perko up until December the 6th?

A. No, I had not.

Q. Did you talk about any employer with respect to Jake Perko after December 6?

A. I did not.

Q. You didn't talk to anybody about Jake Perko?

A. I certainly did not.

Q. Did you advise any employers that Jake Perko's foreman's rights had been taken away from him?

A. I did not; and I would have no reason to do that.

Q. Do you know whether Jake Perko's foreman's rights had been taken away by the Local Union 207?

A. Jake Perko's rights had never been taken away from him.

Q. Did Local 207, did you or any other officer on behalf of Local 207 advise Jake Perko that iron workers would not [fol. 153] work with him?

A. We did not.

Q. Did you advise any employer that iron workers would not work with him?

A. I did not.

Q. In your dealings with the William B. Pollock Company over these jurisdictional disputes to which you refer that were submitted to labor management, did you discuss them with Mr. Walsh, Mr. Francis Walsh?

A. Mr. Walsh and I had many discussions over jurisdictional disputes on the William B. Pollock jobs. I would say that on many, many occasions Mr. Walsh would not only contact me at my office, he would contact me at home, as early as 6:00 o'clock in the morning and as late as 11:30 at night.

Q. And the purpose of the calling was because there was trouble on the job with the boilermakers?

A. Correct.

Q. Did Mr. Walsh at any time call you either at your office or at your home over the refusal of the men working with Mr. Perko to take orders from Mr. Perko?

A. He did not.

Q. Did he ever discuss that matter with you?

A. He has never to this day discussed that matter with me.

Q. Do you know whether the William B. Pollock Com- [fol. 154] pany either through Mr. Walsh or through any of its other representatives who are authorized to speak for that company, whether they have contacted the Local Union concerning their right to retain Mr. Perko in a supervisory capacity?

A. At no time has our organization been contacted by the William B. Pollock Company to that effect.

* * * * * * *

[fol. 160] Cross examination.

By Mr. McDonald:

Q. Mr. Thomas, you just got through testifying not more than two or three minutes ago that Mr. Perko said it was immaterial to him whether he is found guilty or not because he was going to retire; is that correct?

A. Yes; that was the statement that I heard him issue that night.

Q. Mr. Perko, this Mr. Perko sitting here; it is immaterial to me because I am going to retire?

A. That was the remark he made.

Q. He used the word "immaterial"; is that correct?

A. Well, yes.

Q. Now, you say you cannot exactly remember what the finding was or what the exact penalty was that was imposed on Mr. Perko at this trial on December 8. Is this the executive board meeting minute book?

[fol. 161] A. It is the executive board meeting book.

Q. Turn to the meeting of December 8, 1953, please.

A. You say December?

Q. December 8, 1953.

A. Yes, sir, I have it here.

Q. Will you read the minutes of that meeting to the jury, please?

A. "Executive board meeting of Tuesday evening, December 8, 1953. Meeting called to order at 8:00 p.m. by chairman Henry L. Gorgas. All members present. First order of business was the reading of charges against Jake Perko, book number 89154, to the executive board. Jake Perko was present at the reading of the charges against him. Chairman Henry L. Gorgas asked Jake Perko if he wanted a trial by jury or before the executive board. Jake Perko said he did not want a jury trial and asked to have his trial before the executive board. Executive board proceeds with the trial. Witness called in, Thomas Doyle, book number 252239; William Schoppy, book number 220413; Leo Durkin, book number 269797; W. S. Donitzen, book number 435956; Bert Nock, book number 185727. Bert Nock said

all he could say was that what was on the paper is correct. William S. Donitzen said the charges were true as far as he knew. William Schoppy said the iron workers had the majority of hours on the job, said he was sent to Hubbard for a few days and was not called back on the Ohio Works job. [fol. 162] Leo Durkin confirms the charges against Perko, said they dismantled stairways and done work in general, and said Francis Walsh told him also to go to Hubbard and said Walsh told him he would be back on the Ohio Works job in a few days. Leo Durkin," in parenthesis, "'discussed the job in general', but was not called back. Thomas Doyle said Jake Perko knew very well the agreement between the iron workers and boilermakers and that Perko was guilty of infractions and confirmed the charges against Jake Perko. Jake Perko is called in. Said he kept time and acts as inspector. Said Francis Walsh told him he was superintendent on that job as Walsh was saving it for him. Said it was Francis Walsh's doings of hiring a swing lineman, no iron worker. Also said he did—cannot make out this work—of the rigs, probably—of the rigs coming back in after it went out. Said he was paid off in full that Friday night with the rest of the gang and that Francis Walsh called him later Saturday night to go to work Monday morning on the Ohio Works job and he was to be in charge of that job. Executive board decision that Jacob Perko, book number 189154, is found guilty of the charges and this is the second offense on similar charges and Jacob Perko must pay the balance of a previous fine, $300, leveled November 19, 1951, which is $200. Fine of $200 must be paid before next dues are paid. The executive board also fines Jake Perko $200 on this charge which is suspended but will be paid if any re-occurrence of this nature. General discussion of things in general; "James [fol. 163] D. McCarthy."

Q. That is the complete minutes of the meeting of the executive board of your Union, December 8, 1953; is that correct?

A. To the best of my knowledge; I would say they are.

Q. Now, the subsequent meeting of the executive board is when? If this one met on the 8th, then two weeks later would be the 22d; is that correct?

A. Our executive board meetings are held on the second and fourth Tuesdays of the month.

Q. Well, what is the next following executive board meeting?

A. December 22.

Q. Now, will you tell the Court and jury whether or not the minutes of the previous meeting were read and approved?

A. No, they were not; and that is not the custom of the organization to approve the minutes of the executive board.

Q. But the minutes are normally read; isn't that correct?

A. Not always, no.

Q. I see. Well, now Mr. Thomas, there was not a thing recorded in your minute book about Mr. Perko's making a statement that he was going to retire; isn't that correct?

A. That is correct.

Q. And it is recorded in there that Mr. Perko stated that he was the superintendent on the job; isn't that correct?

A. That is correct.

[fol. 164] Q. And you previously testified that as late as December 11, the time of the last decision of this labor management committee, that you didn't even know that Jake Perko was a superintendent on that job and yet you were present at that trial on December 8 when he so testified?

The Court: This is argumentative. It is an argument with him.

A. In my testimony, my intent was that during the time of that difference of opinion down there was going on, I had no knowledge of Mr. Perko being the superintendent on that particular job.

Q. I misunderstood you. You say during the time this agreement was going on; do you mean the time that this matter was being submitted to the labor management committee for their decision?

A. That is right.

Q. I see. Now, isn't it a fact, Mr. Thomas, that the job steward, Thomas Doyle, acted more or less as a prosecutor at this hearing before the executive board?

A. That is very untrue.

Q. That is not true?

A. That is not true.

Q. Isn't the formal procedure in trials based on charges filed in your Union that the man is entitled to be represented by an attorney or some other member of the Union?

[fol. 165] A. Yes, sir, it is.

Q. Now, the minutes have not reflected that Mr. Perko was given this opportunity, do they?

A. They do not reflect that.

Q. And when you testified on direct examination by Mr. Green relating step by step what happened at that trial, you did not relate to us, did you, that Mr. Perko was given the opportunity to have an attorney?

A. I did not; but every member in our organization is given that right.

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The Court: It is in here.

A. Any member in good standing can represent this man: no legal counsel.

Q. This is covered in your Constitution?

A. I would rather think that; because in all my years in the organization we have never entered into having legal [fol. 166] counsel at a hearing.

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[fol. 169] Q. But it was the Pollock Company's contention at this December 11th meeting and prior thereto that the rigs should be manned by boilermakers in this particular instance; isn't that correct?

A. It was; and that is what we could not understand, because prior to that they had settled on man-hours and they had also had a decision rendered that the iron workers would man the rigs.

Q. But this was the contention of the Pollock Company?

A. In the last meeting.

Q. That the boilermakers should man the rigs?

[fol. 170] A. In the last meeting it was their contention.

Q. But the labor management committee decided that the Pollock Company was correct and that the rigs should be manned by boilermakers?

A. In the final meeting that was the decision.

Q. The decision that was announced December 11, 1953?

A. Yes, sir.

Q. Now, you testified on direct that following the announcement of the labor management committee on December 11, 1953, that you instructed your steward to remove the men from the job?

A. I did.

Q. And also following that decision of December 11, 1953, your Union resigned from the joint labor management committee; isn't that correct?

A. Well, it was not immediately after; it was sometime later that we did.

Q. Was that the last matter that your Union ever submitted to that committee for arbitration?

A. I would say that was the last jurisdictional dispute of any craft that was sent to that particular committee. I might further go on to say though that that committee did exist and I did attend their meetings.

Q. I see. Now following the trial of December 8, 1954, [fol. 171] did Mr. Perko do anything to get his affairs straightened out with Local 207?

A. Not with me he did not.

Q. But he appealed to the International, did he not?

A. He did appeal to the International.

Q. And the fine that was imposed on him by Local 207 was suspended and Mr. Perko was placed on probation?

A. The fine was suspended with provisions; yes; and he was put on probation.

* * * * * * *

[fol. 177] Q. Now, Mr. Thomas, to your knowledge, since you have been a member of Local 207, has anyone lost their foreman's rights in your Union?

A. Never since I have been a member I have never known of anyone to lose their foreman rights.

[fol. 178] Q. Now, is the answer the same for the period since you have been business agent for the Union?

A. No, sir. I mean that no one has lost their foreman rights since I have been business agent; that I can assure you.

Q. Are you sure of this?

A. I am very sure of it, yes.

Q. Well, now we have been using the term "foreman rights" considerably through this trial. Can you tell us exactly what foreman rights are?

A. A foreman—in the iron workers Local, would be a member of our Local who would give instructions to the journeymen.

Q. So that the foreman rights then are the rights to give orders to the journeymen?

A. Correct.

The Court: May I ask a question. It must be bothering the jury if it is bothering me. Who chooses the foremen?

The Witness: The employer or management always in the history of the Local, in the Youngstown district, has selected their own foremen.

The Court: Well then, what does the Union have to do with the rights of a foreman or foreman rights?

The Witness: We have absolutely no control over a [fol. 179] foreman.

The Court: Am I right in supposing, however, that a foreman, even if chosen by the management, must nevertheless be a recognized member of your Union?

The Witness: He does not have to conform to all rules of the Union.

The Court: He does not?

The Witness: He does have to be a member and does have to conform to all rules of the organization.

The Court: So that if I may pursue this, please, so that when you are talking about loss of foreman rights, as far as the Union is concerned it would mean that he would not be a member of the Union. If he were not a member of the Union, he could not be a foreman on a job with Union men; is that right?

The Witness: That is very correct.

* * * * * * * *

[fol. 182] Q. Now in your power of your position as business agent for Local 207, have you ever taken a man's job away from him, told him he was not allowed to work?

A. I have never done that, no.

* * * * * * * *

[fol. 189] Whereupon, the Defendant WILLIAM THOMAS, resumed the stand and testified further, as follows:

Redirect examination.

By Mr. Green:

Q. So that the Court will know what I am doing; I am picking up the exhibits that have been introduced previously. Mr. Thomas, I am handing you a document which has been identified for record purposes as Defendants' Exhibit No. 6. Will you identify that document, please?

A. Yes. This is a record of our files on the membership of Jacob Perko.

Q. That record is kept by whom?

A. By the office secretary.

Q. Is that record showing dues payments by members of the Union?

[fol. 190] A. It does.

Q. Does that record indicate whether a member is in good standing with the Union?

A. Yes, it does.

Q. You say that record that you have before you is the record of Jacob Perko?

A. It is.

Q. What, according to the record, that you have before you, was Mr. Perko's status in the Union in the month of December, 1953?

A. December of 1953?

Q. Yes.

A. He had his dues—he paid his December dues on November 27, 1953.

Q. That indicate what his standing was in the Union then?

A. When he pays his November dues in December—he is not in good standing. The month has to be paid in the current month. He would be in good standing there. I am sorry. He paid his December dues in November.

Q. So that he was in good standing in the month of December?

A. Yes, he was.

Q. And what was his standing in the Union in the month of January?

[fol. 191] A. In the month of January; that would be in 1954?

Q. Yes.

A. He wasn't in good standing; because he paid the month of January in November 27, 1953.

Q. If he paid his dues for the month of January, 1954,—

A. You are right. The man then was in good standing in the month of January because he did pay his dues November 27, 1953.

Q. All right. What was his status in the Union in the month of February of 1954?

A. In the month of February, that is the first month of that particular time he became not in good standing. He paid the month of February on May 5, 1954.

Q. And that record that you have before you shows payments of dues by Mr. Perko on through what period of time?

A. From the period of December 20, 1940, up until March of 1954.

Q. That he paid dues to the organization through March of 1954; is that right?

A. Yes.

Q. And according to the records that you have before you, is there any notations as to when he was suspended from membership?

A. It says, "Suspended, 3/31/55".

Q. What is the requirement under your Constitution for [fol. 192] suspending a member who does not pay his dues?

A. In that particular year, a man had to be 12 months in the arrearage to become a suspended member.

Q. During the period of time less than 12 months, in which a member did not pay dues to the Union, would he be eligible for employment?

A. Yes, he would.

Q. Would he be eligible under the terms of your collective bargaining agreement to hold the position of a foreman?

A. He would.

Q. Under the terms of your collective bargaining agreement and your rules, what period of time upon the failure of payment of dues would it be before he could not hold a position of a foreman?

A. Twelve months in the arrears.

Q. Mr. Thomas, do you have with you the minute book for your regular membership meetings?

A. Yes.

Q. Do you have with you the minutes of the meeting that were taken on June 18, 1951?

A. Yes, I do.

Q. On the date of June 18, 1951, did the organization take any action with respect to the right of iron workers to work with or assist boilermakers?

A. Yes, they did.

[fol. 193] Q. What action was taken?

A. "Motion by Charles Hall that any member that leaves the iron workers to go in as a boilermaker or assist them in any way will be fined $500; seconded by C. V. Leach; provisions shall be made in some case. Fifty for the motion, one opposed."

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Q. Are you required to advise the International when you impose a fine upon a member?

A. We are.

Q. Are you required further in advising the International of a fact that a fine has been leveled to advise them the circumstances under which the fine is leveled?

A. Correct.

Q. Does the International have any right to review the imposition of the fine?

A. Yes, they do.

Q. Are you bound by the International's determination of it?

A. We are.

• • • • • • •

[fol. 198] Q. Here is a document which has been identified for record purposes as Defendant Exhibit No. 11. Tell us what that document is?

A. "March 26, 1954. Mr. Jacob A. Perko, 39 Rover Street," it should be River Street, "Girard, Ohio. Dear Sir and Brother: This office submitted your protest of penalty levied against you by Local No. 207 to an International representative for investigation and after giving his report due consideration it has been decided to deny approval of the penalty but you will be placed on probation pending future activities. Please be guided accordingly. Best Wishes. Fraternally yours, J. R. Downes, General Secretary."

Q. Did you organization receive a copy of that communication, Mr. Thomas?

A. Yes, we did.

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[fol. 200] Recross examination of Mr. Thomas:

• • • • • • • •

Q. Now, Mr. Thomas, handing you Defendants' Exhibit 10, which you testified is the letter sent to Mr. Perko by you notifying him to appear at the executive board meeting of December 8, 1953, is there anything in that letter that says charges are enclosed?

A. Charges are enclosed in every letter of this description.

Q. But is there any reference in that letter to the charges?

[fol. 201] A. No.

Q. Just tells him to appear at the board meeting on December 8?

A. It does.

Q. Now, handing you Defendants' Exhibit 9, the return receipt attached to this copy of the letter shows that Mr. Perko received this letter on December 8, 1953; isn't that correct?

A. That is correct.

Q. That was the day of the meeting; is that correct?

A. That was the day of the meeting; but he was there, so he received it.

Q. The letter does not say anything about charges whatsoever?

A. It does not; but every letter of that description, the charges are enclosed.

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[fol. 202] Whereupon, the Defendants called HENRY GORGAS, who, having been previously sworn, resumed the stand and testified further, as follows:

Direct examination.

By Mr. Green:

Q. Your name is Henry Gorgas?
A. Yes, sir.
Q. You reside where?
A. 250 Scotland Avenue.
Q. Is that in the City of Youngstown?
A. That is in Boardman.
Q. How long have you lived in Mahoning County, Mr. Gorgas?
A. About 30 years.
Q. What is your occupation?
A. Structural iron worker.
Q. How long have you been a structural iron worker?
A. Well, about 33 years, since I first started, structural iron worker.
Q. Are you a member of Local 207?
[fol. 203] A. Yes, sir.
Q. How long have you been a member of Local 207?
A. Full 33 years.
Q. You are the president of Local 207?
A. Yes, sir.
Q. You have been president for how many years?
A. Either eight or ten years.
Q. You were president during the year 1953?
A. Yes, sir.

* * * * * * *

[fol. 209] Q. All right. Following the meeting by the executive board in which you tried Mr. Perko and assessed the fine against him, did the executive board undertake any action whatsoever with respect to his employment by the William B. Pollock Company?
A. No, sir. We had no conversations or communications with the William B. Pollock Company.

Q. Did the executive board advise any employer of the action that was taken against Mr. Perko?

A. This was strictly Union business and no employer was notified or anything about this trial.

Q. Did Mr. Perko at the time of the trial, the evening of December 8, say anything about his foreman's rights?

A. There was never anything said about no foreman's rights.

Q. When did you as an officer of Local 207 first become aware that Mr. Perko was complaining that the Union had taken away his foreman's rights?

A. When he started suing us, about six or seven years ago; that is when I first knowed of it, because there was no—never got in touch with the executive board or myself at any time.

Q. Do you know from your own knowledge, Mr. Gorgas, whether any officer of your Union advised any employer, including the William B. Pollock Company, that they could [fol. 210] not employ Mr. Perko in the capacity of a foreman or superintendent?

A. No, sir.

Q. You have no knowledge?

A. No, sir.

Q. Do you know of any members in your organization who entertained the opinion that Mr. Perko could not be a foreman or superintendent?

A. No, sir, I do not.

Q. Has the subject of his right to act as a superintendent or foreman ever been discussed on the floor of your organization?

A. No, sir, it has not.

Q. Has it ever been discussed in the executive board meetings?

A. No, sir.

Q. Mr. Gorgas, you have worked at the trade a long time, have you not?

A. Yes, sir.

Q. How do you obtain your employment?

A. I look for my own work.

Q. What do you mean?

A. Wherever there is a job, I either go to the gate or try to see either the superintendent or foreman on the job and I find out if they need any men.

Q. Then when you are employed, usually in what capacity?

A. Generally as journeyman.

[fol. 211] Q. All right. How are appointments to the position of foreman made as foreman?

A. Well, generally the way I get my foreman job, after I am on for a while and the man thinks I am capable and if he needs a foreman, I get a foreman's job; that is all.

Q. And the appointment to the position of foreman is made by a man you say; what position does he hold?

A. I didn't get that last question.

Q. Who is the man who determines whether you have the capability of being a foreman?

A. Well, either the general foreman or superintendent; if they have a general foreman on, generally he determines that; or the superintendent on the job.

Q. In all of your experiences as an iron worker and as an officer of this Union, do you know of any instance in which the Union exerted a right to tell a contractor who they might use as foreman?

A. No, I do not.

Q. Is there any requirement in your Constitution, by-laws or working rules that a superintendent of a construction project be a member of your Union?

A. There is nothing. He does not have to be a member.

Q. Even if he is not a member of your Union, the iron workers would work with him?

A. Yes, sir.

[fol. 212] The Court: How about a foreman?

The Witness: The foreman—well, our regular term is a pusher.

The Court: Does he have to be, as distinguished from the superintendent, a member of the Union?

The Witness: Yes, sir, he does.

The Court: You are the president, are you not?

The Witness: Yes, sir.

The Court: I notice in your Constitution, Section 45, "No Local Union shall for any cause whatsoever deprive mem-

bers of this Association of their foreman rights unless approved by the General Executive Board." How could a Local Union deprive a member of his foreman rights?

The Witness: The only possibility that could be, you'd have to go to our headquarters, that would be St. Louis, to the General Executive Board, the International Executive Board. That would be the only way I could possibly see where it could be done.

The Court: Well, what is it that would be done to deprive him of his foreman rights?

The Witness: I don't know what possibly could outside [fol. 213] of employer is the only one I know of that could possibly deprive him of that.

The Court: In the business of reading laws and trying to find out what those who made them meant, that is why I ask about that.

Q. Mr. Gorgas, on the construction jobs that you work, when is the last time you worked?

A. Well, last Friday.

Q. Fine. Will you tell us what chain of command is on a construction job?

A. Well, my chain of command right now on this particular job is my foreman, general foreman and superintendent.

Q. All right. Now the superintendent, does the superintendent work with the tools of the trade?

A. No, sir, he does not.

Q. To whom does he give his direction?

A. On this particular job it is to the general foreman and from the general foreman to the foreman and then to the men.

Q. Do the foremen work with the tools of the trade?

A. Foremen? They can, yes. Generally, they are busy enough to plan their work; keeps them busy to plan their work ahead and let the men do the work.

Q. But they are permitted to work?

A. Yes.

Q. Superintendents are not?

[fol. 214] A. No, sir.

Q. When a construction job is completed, what happens to the men?

A. It is payday.

Q. Everybody is laid off?

A. Yes, sir.

Q. Is this true as to the men who have been engaged in the capacity of a foreman?

A. Is it true about foremen?

Q. Yes.

A. Yes; generally it is true too.

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[fol. 215] Further cross examination.

By Mr. McDonald:

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[fol. 216] Q. Now, you say that you yourself got to be a foreman; I believe you testified, stop me if I am wrong, that you got to be a foreman at one time anyway, after you had been on the job for a while and the boss, general superintendent, felt you qualified; is that correct?

A. That's right.

Q. Have you ever been a general foreman?

[fol. 217] A. No, sir, I never have.

Q. Have you ever been a job superintendent?

A. No, sir.

Q. Now, when were you a foreman?

A. Up to about six or seven weeks ago when we had to cut down again because the work was pretty well finished up. Now I am back working as a journeyman.

Q. So you were a foreman while you were president of the Union?

A. Oh, yes.

Q. And as a foreman, it is your responsibility to take orders as they are given to you from the general superintendent or general foreman?

A. Yes, sir, it is.

Q. Pass them down to the men; is that correct?

A. That's right.

Q. So, have you ever refused to take orders as a foreman?

A. No, sir.

Q. Those would be company orders coming down to you as a foreman?

A. That is right.

Q. It is actually a promotion, to be made a foreman, isn't that correct?

A. Well, it is, and—in construction you are all iron work; it does not mean as much. One day you can be foreman; [fol. 218] next day you are back on the line; because our work fluctuates so much on the job.

Q. You do get paid more?

A. Yes, you do.

Q. Does the general foreman get paid more than the regular foreman?

A. Yes, sir, he does.

Q. And the job superintendent gets paid more than the general superintendent?

A. I imagine he does; I don't know what the rate is for the general superintendent. He must get more than the foreman.

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[fol. 225] Q. And do you recall my asking you these questions and you giving me these answers: "Question: Have you ever been employed as a foreman? Answer: No, sir, I was offered the job but as long as I am president I won't accept a job as foreman."

A. Yes, I did say that; and I'd like to tell you the reason why, if you don't mind.

Q. Go right ahead.

A. Because most of our trouble as an officer is with your own members; and the first thing they will throw at you if you are a foreman or general foreman, you are a company man; and our members cause us most of your trouble. Employers cause a certain amount; but generally it is our members trying to get more than what they have coming to them; and you have to rule against them. And as I say, the first thing they throw at you, well, you are a company man now and you are sticking up for the company. We have to live according to the negotiated agreement; and that is the reason I would not take—until this job here about 10 years, I would not take a foreman's job or any other job except journeyman's job for that very reason.

Q. You are in the middle between representing the Union [fol. 226] and representing the company?

A. Yes, sir; and most of your trouble is with your own members trying to get more than they have coming to them.

Q. Nor in the way of money?

A. Money or working conditions.

Q. Or working?

A. No. Working conditions.

Q. Conditions?

A. Yes. And we have to live up to our agreements same as anyone else; and they will throw that to you and there is a certain amount of people believe that. So it is to save a lot of trouble, I haven't been taking any foreman's jobs for that very reason.

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[fol. 264] Whereupon, the Defendants called JAMES E. CORBETT, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. State your name.

A. James Corbett.

Q. Where do you live?

A. 345 Lewis-Siefert Road, Hubbard, Ohio.

Q. Mr. Corbett, when there is noise outside, when a horn blows, it drowns out your voice. Try to keep it up.

A. Yes, sir.

Q. You are employed, Mr. Corbett? Are you employed now?

A. I was last Friday.

Q. What job?

A. With the Diamond Steel Construction Company in the Youngstown Sheet and Tube.

Q. Structural iron worker?

A. Yes, sir.

Q. How long have you been an iron worker?

A. I began in 1938.

[fol. 265] Q. Worked at the trade since then?

A. Yes, sir.

Q. You are a member of Local 207?

A. I am.

Q. Are you an officer of Local Union 207 now?

A. Not at the present time.

Q. Were you an officer in the past?

A. Yes, sir.

Q. When were you an officer of Local 207?

A. I was an officer of the executive board for about three or four years, from perhaps '51 to '54, or something like that.

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[fol. 266] Q. On December 8, 1953, were you a member of the Local executive board?

A. Yes, sir.

Q. At that time did you know Mr. Jake Perko?

A. Yes, sir.

Q. How long had you known Mr. Jake Perko?

A. I have known Jake Perko, well, for a long time, practically all my life that I can remember of knowing anyone outside of my immediate family.

Q. Was Mr. Perko a friend of your family?

A. He was a friend of my father's.

Q. Did he visit you at your home?

A. In my earlier days I can remember of Mr. Perko visiting my father, because they had worked together.

Q. On the evening of December 8, 1953, were you aware that charges had been filed against Mr. Perko by members of Local Union 207?

A. I had heard nothing official and maybe by rumor I had heard something; but we don't go by anything of rumor. It has to be fact.

Q. What job were you working on at that period of time; [fol. 267] do you recall?

A. I believe I was working in the U. S. Steel plant for the American Bridge Company; if I recollect right.

Q. What work were you doing?

A. I don't know. I worked for them off and on for so many years. I can't recall the exact job or what I was doing; but I do know this, that the only time I would see the job that Pollock Company had was in the morning

going to work I would ride by it on the truck and in the evening after the day's work was done I would come back up through the mill and I'd see it then.

Q. Did the American Bridge Company—is it a division of the U. S. Steel Company?

A. Yes, sir.

Q. Did you know before December 8, 1953, of any trouble that was going on with the job with Mr. Perko and the men that were working with him?

A. I didn't hear of any labor trouble, other than what we had been having, jurisdictional disputes and so on, and that a boom got buckled or something, and that is always a point of interest; we wonder why and what extent—

Q. What was the question as to whether you had heard of any trouble between the iron workers and Mr. Perko?

A. I don't believe I did hear of any too much trouble there.

[fol. 268] Q. On December 8, 1953, you attended the executive board meeting?

A. Yes, sir.

Q. Will you tell this jury who convened that meeting?

A. Our president, Henry Gorgas.

Q. Will you tell us then in your own words what happened after Mr. Gorgas called the meeting to order? Tell us, first, who was there.

A. Well, our entire executive board was there; Mr. Thomas was there; and, of course, we see what is on the agenda; and the president says that Mr. Perko is there and is confronted with some charges. So we proceed with the case; and Mr. Perko is called in.

Q. Then what happened after Mr. Perko was called in?

A. Mr. Perko was called in and confronted with the charges that he was—well, I'd say he was accused; and Mr. Gorgas read the charges and asked Jake Perko what he thought about them. And he said that he thought he was guilty. And he was asked at the time how would he prefer to have his trial, whether he would prefer a jury trial or to be heard by our executive board; and he preferred to be heard by our executive board. So then, if he wanted to be heard by the executive board, he could have been heard that evening; but he was asked if he wanted to provide any

counsel for himself; asked if anybody to speak for him; he said no, he would speak for himself. So then we car-
[fol. 269] ried on with the trial and just as fair and democratic a trial as we were capable of doing.

Q. Was Mr. Perko in the room while the trial went on?

A. Yes, sir.

Q. Were the witnesses called while he was in the room?

A. Yes, sir. Mr. Perko was in there and each witness was called in individually because we didn't want to get a bunch of people in there back and forth. We wanted to hear each and every person and so we'd have everything straight; because Mr. Perko claimed that he was guilty of the charges, and we didn't have much to prove, he already claimed it. So we wanted to try and disprove the charges if it would be possible.

* * * * * * * *

[fol. 270] Q. After the evidence was in, what did the executive board do?

A. After the evidence was in, then we asked the last witness that was in the room and Mr. Perko to leave the room so that we could deliberate on the problem and come to some honest conclusion. A true conclusion and fair conclusion for both sides. Because we don't want to injure anyone—

The Court: Well, you are getting arguimentative.

Q. Just tell us what you did.

[fol. 271] A. We deliberated on the problem and come to a verdict that Mr. Perko was guilty.

Q. After you concluded that Mr. Perko was guilty, what did the executive board do?

A. Then we assessed the fine.

Q. The amount of the fine, do you recall that?

A. I believe that he did have a fine hanging over his head or it was on probation or suspended on condition, and then I believe he had another two hundred dollar fine put on him.

Q. Was Mr. Perko called into the room?

A. Mr. Perko was called into the room and given the verdict, yes, sir.

Q. Who gave him the verdict?
A. Mr. Henry Gorgas.

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[fol. 277] Whereupon, the Defendants called RALPH HUBBY, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. State your name, please?
A. Ralph Hubby, H-u-b-b-y.
Q. Where do you live?
A. 3811 Market Street.
Q. City of Youngstown?
A. Yes.
Q. How long have you lived in Youngstown?
A. Oh, I think around 1915, when I first come here.
Q. Are you a structural iron worker?
A. Yes.
Q. How long have you been a structural iron worker?
A. Oh, 25 years, about say more or less about 25.
Q. Are you working at the trade now?
A. No; I am retired.
Q. When did you retire?
A. Why, I retired last year; but I was more or less semi-
[fol. 278] retired for the last three or four—about three years; but I give it up about a year ago.
Q. Are you an officer of Local Union 207?
A. Not now, no.
Q. Have you been an officer of Local Union 207?
A. Yes.
Q. What offices have you held in the Union?
A. Executive board, member of the executive board.
Q. Were you a member of the executive board in 1953?
A. Yes.
Q. Were you actively working at the trade in 1953?
A. Yes.

Q. Would you recall who you were working for in the month of December, 1953?

A. I think I was working for the American Bridge.

Q. Would you know where you were working?

A. Over to the Ohio Works. I am not sure about that; I might have been in Niles up there. I think I was working with American Bridge.

Q. Did you know Jake Perko?

A. Yes.

Q. How long had you known Jake Perko?

A. I have known Mr. Perko for a long time, since—oh, 20 years, I'd say, 15, 20 years anyhow.

Q. Did you work with Mr. Perko?

[fol. 279] A. Yes.

Q. On December 8, 1953, did you attend an executive board meeting?

A. Yes.

Q. Did you know before you came to that meeting that the executive board was to hear charges that had been filed against Mr. Perko?

A. Yes, I did.

Q. Who advised you?

A. Well, the meeting previous to this executive board meeting, we heard something about they was having some trouble with Mr. Perko.

Q. At the meeting previous to this?

A. Well, I would not say it was the meeting previous to that; but it could have been the meeting of the night that we tried him there. I think that is more like it. It was the meeting of the 3d there that they brought it up and they said, "Well, we are going to start this meeting off with the Mr. Perko case."

Q. Well, so we understand now, your recollection as to whether you first heard that Mr. Perko was going to be charged by a member of the Union is when? When do you think you first learned—

A. That was on the 3d, the night of the 3d, yes, before the meeting started.

[fol. 280] Q. You mean the night of the meeting?

A. Yes.

Q. And that meeting was December 8?

A. That is right.

Q. And it was that night that you heard?

A. What?

Mr. Goldberg: I object. I think the witness ought to answer his own questions.

Mr. Green: The witness has said the night of the meeting, December 3. I am sure he then says the executive board meeting.

The Witness: It was the executive board meeting.

Q. That was the night you first learned of it?

A. That's right.

Q. Will you tell us who convened the meeting?

A. Well, there was five executive officers and the president, business agent and the secretary was present there.

Q. What time did the meeting start; if you recall?

A. We usually start at 8:00 o'clock.

Q. What was done after you began your meeting?

A. Well, Mr. Gorgas, the president, he had the letter and the charges in this letter. So he told us to read them over; set it on the table; and I know I read it; and the rest of them; and then we called Mr. Perko in and the president [fol. 281] did—and he told him that—I think he read the charges; I am not sure about this; he had been found guilty—or had been found that he had been doing work for some other company and trade; and if he'd like to be tried before the body or the executive board; and he said, "I will be tried by the executive board."

Q. After Mr. Perko said, "I will be tried by the executive board," what happened?

A. Well, we started the case right there; and so we called in different witnesses, and we heard the testimony and after that was all in, why—

Q. Before you get to that, where was Mr. Perko when the witnesses were called in?

A. Oh, Mr. Perko was in the room there with us.

Q. In what room are you referring to?

A. In the executive board, the office.

Q. With the executive board members there?

A. That is right. They called him in and read these charges to him and so we started the meeting right there.

Q. Did he remain in the room while the witnesses were being called in?

A. Oh, yes.

Q. Did he remain before the executive board during the entire time that evidence was being heard by the executive board?

A. Oh, yes; yes.

[fol. 282] Q. After the executive board heard all of the evidence, what did you do?

A. After the evidence was all in and so they asked Mr. Perko to leave the room, to go out into the hall; and Mr. Gorgas says, "Hubby, you act as teller, and we are going to take a secret vote." So he gave me some little pieces of paper; and I distributed around to the five executive board members, and I collected them, set them up on the table; I looked at them, and they was all "yes". So the president looked at them and they was all "yes". So the rest of the board looked at them. I told them, "Is this for guilty or not guilty? It is not for anything else." He said, "Well, it is just whether he is guilty or not guilty." That was the case.

Q. Was there any discussion by the executive board as to the right of Mr. Perko to be a foreman?

A. No. No.

Q. Mr. Perko raised the question with the executive board as to whether the executive board was trying to take away his right to be a foreman?

A. No. We called Mr. Perko back in, president called Mr. Perko back in after we had taken this vote, and he just told him he was found guilty.

Q. And what was the penalty?

A. We had not made the penalty right then. It was just whether he was guilty or not guilty. Then we decided [fol. 283] what—I think Mr. Gorgas said something; we decided that it would be a two hundred dollar fine.

Q. Was that the nature and extent of the penalty, $200?

A. Fine. And then he had been fined $200 before; and he'd have to pay that too before he could go to work.

Q. This is what was told to Mr. Perko?

A. Yes.

Q. Did Mr. Perko say anything after you told him that he was being fined?

A. He says, "Well, I have to take orders from the company and I have to do what they tell me." That is all I heard Mr. Perko say.

Q. After Mr. Perko made this statement, what did the executive board then do?

A. Well, that was it. We left.

Q. Did the executive board at any meeting since December 8, 1953, in which you participated, in which the question of Mr. Perko's right to be a foreman was discussed?

A. No; we didn't discuss that at all; I didn't hear nothing like that.

Q. Do you know of any action taken by the executive board to direct the members not to work for Mr. Perko as a foreman?

A. No; I didn't hear anything like that.

Q. Do you know of any employers that had been advised by either the officers or members of the Union that they [fol. 284] could not hire Mr. Perko as a foreman or superintendent?

A. No, I haven't.

Mr. Green: You may inquire.

Cross examination.

By Mr. Goldberg:

Q. Mr. Hubby, were you in the executive board room at all times during this trial?

A. Yes.

Q. And were you there during the entire time that the executive board discussed the matter with Jake after he was found guilty?

A. After?

Q. In other words, were you there for the entire meeting?

A. Yes.

Q. And you were there even after Jake left?

A. Well, I think—yes, I was there.

Q. Okay. Then you had a chance to see and hear everything that went on?

A. That is right.

Q. Did Jake admit that he was guilty?

A. No, he didn't.

Q. Did he admit it at any time that he was guilty?

A. Not that I know of, no; I didn't hear that.

Q. Not while you were there?

[fol. 285] A. No.

Q. All right. Now, the next thing, Mr. Hubby, just one or two questions and I will let you go. Mr. Hubby, were the charges read to Jake before the trial started?

A. Well, on this last case I was on the witness stand; I said—well, he told him; but I am sure that he read them. He read the charges, because it was on a paper and we had to have charges and whoever makes the charges got to sign the paper.

Q. Well, you remember the last trial; don't you?

A. Well; not too well; it's quite a while ago.

Q. You testified though; didn't you?

A. That is right.

Q. You were under oath at the time?

A. That is right.

Q. There was a jury?

A. That's right.

Q. Judge, and a court reporter?

A. That's right.

Q. Well, referring back to the official transcript, Mr. Hubby, do you recall my asking you this question? I asked you if the charges against him were read to him. Do you recall this answer: "No, not that I know of." Do you remember that, Mr. Hubby?

A. No, I don't just remember that. I remember that [fol. 286] question that you asked me; and I said, well, he told him that Mr. Gorgas Mr. Gorgas told him the charges—

. . . . . .

[fol. 287] Whereupon, the Defendants called JAMES CASTNER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. State your name, please.
A. James Castner, C-a-s-t-n-e-r.
Q. Where do you live?
A. R. D. 2, Hubbard, Ohio.
Q. How long have you lived in Hubbard?
A. I have lived in Hubbard about 20 years.
Q. What is your occupation?
A. Iron worker.
Q. How long have you been an iron worker?
A. Since 1943.
Q. Are you a member of Local 207?
A. Yes, sir.
Q. Are you an officer in that Union?
A. Vice-president.
Q. How long have you been vice-president?
A. Since around 1950 or '51; I don't know just what year.
[fol. 288] Q. In 1953, were you vice-president of the Local Union?
A. Yes.
Q. How do you secure the office of vice-president?
A. By nomination and vote.
Q. What is the term of your office?
A. What?
Q. What is the period of office to which you are elected?
A. For two years since 1954; since the convention in 1954, it's been for two years.
Q. Before that?
A. One year.
Q. Do you remember the executive board in 1953; were you a member?
A. Yes, sir.
Q. Were you serving on the executive board on the evening of December 8, 1953?
A. Yes.

Q. Did you attend an executive board meeting that evening?

A. Yes.

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[fol. 294] Cross examination.

By Mr. Goldberg:

Q. Mr. Castner, working with booms are dangerous, aren't they?

A. Yes, they are, if they are not used right.

Q. As a matter of fact, men have been killed through the misuse of booms, haven't they?

A. That is right.

Q. And it is very important that they be operated properly; isn't that right?

A. That is so.

Q. And you say that part of the charges against Jake was that while he was a superintendent he was instructing boilermakers in the use of those booms; isn't that right?

A. That is the way I understood.

Q. Okay. Mr. Castner, is there any rule of the organization that would prohibit the iron workers from taking orders from Mr. Perko as a result of having been fined for assisting the boilermakers?

A. No, sir.

* * * * * * *

[fol. 296] Whereupon, the Defendants called ELLSWORTH WILSON, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. Will you state your name?

A. Ellsworth Wilson.

Q. Where do you live, Mr. Wilson?

A. 1615 Shannon Road Girard.

Q. Girard, Ohio?

A. Yes, sir.

Q. What is your occupation?
A. An iron worker and contractor.
Q. Iron worker and contractor?
A. Yes, sir.
Q. How long have you been a contractor?
A. Four years.
Q. Under what name do you do business?
A. Wake-Son Construction Company.
Q. Mr. Wilson, what kind of construction work does your company do?
[fol. 297] A. Well, we do all types of iron work; but we specialize in re-enforcing steel.
Q. In order to do the kind of work that you contract to do, what employees do you employ?
A. Iron workers only.
Q. The iron workers. How do you obtain your work?
A. How do you hire our iron workers?
Q. Yes.
A. Well, 90 per cent of them I call on the phone. I know the men; I call them. If they are not working, I ask them to come out. On the other 10 per cent I either go to the Hall myself and get them or I call in and have them sent out.
Q. As a contractor, have you signed a collective bargaining agreement with Local Union 207?
A. My partner has; yes; that is his end of it. He takes care of that.
Q. In 1953, were you working as an iron worker?
A. Yes.
Q. Were you a member at that time of Local Union 207?
A. Yes.
Q. Did you know Jake Perko?
A. I have known him since the war, yes.
Q. Have you worked with Mr. Jake Perko?
A. Yes.
Q. In 1953, what company did you work for?
[fol. 298] A. In 1953 I was on the power house at Niles for Townsend and Bowden.
Q. Had you worked for the William B. Pollock Company during that year?
A. 1953; no.

Q. When did you last work for the William B. Pollock Company; do you recall?

A. Oh, I imagine it was '46 or '7; somewhere in there is the last I worked for them, to the best of my recollection.

Q. Did you know of any rulings that were issued or any instructions issued by the Local Union 207 as to the right of members of Local 207 to work with Jake Perko?

A. There were no rules that I know of; whether they could work or could not, I don't know anything about that.

Q. You heard nothing concerning Mr. Jake Perko's status with the Union?

A. No.

Q. Since you have been in business, as a contractor, have you received any instructions from the Union at all concerning the right of your company to employ Mr. Perko?

A. No, sir.

Q. Will you tell us who determines, who has the right to determine who is to be a foreman that is employed by your company?

A. I do.

[fol. 299] Q. Does the Union have any say-so over that matter?

A. Over the foreman? No.

Q. Who makes the determination as to who is going to be the superintendent?

A. I do.

Q. Does the Union have any say-so who is going to be employed in the capacity of superintendent?

A. I hire my own superintendent and foremen.

Q. Will you tell us, what is the authority of the superintendent on the job?

A. Of a superintendent?

Q. Yes.

A. He is the representative of the contractor in charge of all work that the contractor has on that job.

Q. Does he work with the tools of the trade?

A. No.

Q. What is the authority of the foreman on that job?

A. A foreman or pusher is a man that has a gang of men that is under the superintendent; he is in charge of his particular group of men.

Q. Does he give orders to the men that work under him?

A. He does.

Q. The foreman will receive his orders, in turn, from the superintendent?

A. Yes, sir.

. . . . . .

[fol. 300] Cross examination.

By Mr. Goldberg:

Q. You state, Mr. Wilson, that you use iron workers exclusively and do not employ boilermakers?

A. No; I don't.

Q. Then you have no problem with iron worker or boilermaker disputes to—

A. We have never had a dispute between iron workers.

Q. How long have you been in business?

A. Four years.

Q. Where did you work before you went into business?

A. I worked in Youngstown here for the different contractors, for Pollock and Townsend and Bowden.

Q. Since you have been a contractor, have you ever called Jake to work for you?

A. No, I never have.

Q. Are you acquainted with Jake's reputation for competency?

A. Yes.

Q. What is that reputation?

A. Well, he seems to know his business, as far as iron work is concerned, when I worked for him.

Q. You have worked for Jake?

[fol. 301] A. Yes, I worked for him.

Q. In your company, sir, who gives the superintendent his orders?

A. I do.

Q. And he follows your directives; is that right?

A. Yes, he does.

Q. What do you do when he does not follow your orders?

A. Fire him.

Mr. Goldberg: Thank you.

. . . . . .

[fol. 302] Whereupon, the Defendants called THOMAS SAWYER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Green:

Q. Will you state your name, please?
A. Thomas Sawyer.
Q. Where do you live, Mr. Sawyer?
A. 936 Lanterman Avenue, Youngstown.
Q. You are employed by what company?
A. Matt S. Connell.
Q. What kind of work does the Matt S. Connell Company do?
A. Steel erection.
Q. What position do you hold with the company?
A. Vice-president.
Q. How long have you been an officer of the Matt S. Connell Company?
A. About eight years.
Q. During the period of time that you have been an officer of the Matt S. Connell Company, have you received [fol. 303] any word, official or unofficial, from Local Union 207, that would preclude your company from hiring a Mr. Perko?
A. No.
Q. You say what?
A. No.
Q. Is your company a signator to a collective bargaining agreement with the Local 207?
A. Yes.
Q. And was it a signator to a collective bargaining agreement in 1953?
A. Yes.
Q. Does your company employ members of Local Union 207?
A. Yes.
Q. Is there anything in the collective bargaining agreements that you have entered into with Local Union 207 that gives the Union a right to determine who your company will employ in the capacity of superintendent?

A. No.

Q. Who makes the determination as to who will be a superintendent?

A. I do.

Q. By you, you mean as an officer of the company you do that?

A. Yes.

Q. Who makes the determination as to whether an em-
[fol. 304] ployee will be employed in the capacity of a foreman?

A. I do.

Q. Does the Union have any right to tell you who may be employed in the capacity of a foreman?

A. No.

Q. Under your collective bargaining agreement with the Union, what officer or office of the Union do you deal with in order to have official action undertaken with the Union?

A. With the business agent.

* * * * * * *

[fol. 305] Cross examination.

By Mr. Goldberg:

Q. What is your name, sir?

A. Thomas Sawyer.

Q. Do you have a brother Eugene?

* * * * * * *

[fol. 306] Q. Mr. Sawyer, do you have any superintendents that you have had over a period of years?

A. Yes; we have three of them that have been there for quite a number of years. I'd say from 10 to 12 years.

Q. During this period of time, have any of these men worked exclusively for your company?

A. They have always worked for us.

Q. I say exclusively for your company during that period of time?

A. What do you mean "exclusively"?

The Court: For nobody else.

The Witness: They have never worked for anyone else.

Q. Just for you?

A. Yes.

Q. As I understand, you use just iron workers in your business; isn't that so?

A. That is right.

Q. And you don't run into the problem of difficulty with the boilermakers concerning disputes on jobs you have, since you only employ one craft; isn't that true?

A. That is right.

[fol. 307] Q. Are your superintendents members of the Iron Workers Union?

A. Yes.

Q. When you call the Union Hall, to get men, say, when you are short, who do you talk to there to get them?

A. Mr. Thomas.

Q. He is the man that assigns the men to work, is that right, when you call in for them?

A. Yes.

Mr. Goldberg: That is all.

* * * * * * * * *

[fol. 337] Whereupon, the Defendants called FRANCIS WALSH, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. Mr. Walsh, you were in Court here the other day, were you not?

A. Yes, sir.

Q. You were here now pursuant to a subpoena we had served upon you?

A. That is right.

Q. That subpoena requested that you bring with you a [fol. 338] list of the jobs that your company performed since April of 1954?

A. Yes.

Q. And we further asked you to bring with you a list of the names of the men who have been employed by you as a foreman or superintendent?

A. Yes.

Q. And we also asked you to bring with you the ages of the men that were employed in that capacity?

A. Yes.

Q. Have you been able to obtain that information?

A. I have the jobs, and I have the superintendents and foremen from 1954 up till 1957, part of '57. We worked all morning at it, six people; that is the best we could do.

Q. All right. In April of 1954, what jobs were the Pollock Company performing?

A. I don't think they are broken down in months. Jackson Iron and Steel—

Q. Where is Jackson Iron and Steel?

A. Jackson, Ohio. Shenango Furnace Company, Sharpsville, Pennsylvania. Another at Shenango and Sharpsville. That was it in April.

Q. Then do you know how many men were employed on those various jobs?

A. No, I could not say offhand. We don't have the number of people on the jobs. Knowing the jobs, I would say [fol. 339] possibly 20 on each job.

Q. Did you have a superintendent on each one of the jobs?

A. Oh, yes. You have a job superintendent plus whatever foremen are required.

Q. For the job at the Jackson, Ohio, where is Jackson, Ohio?

A. Down in the southern part of the State; about 60 mile below Columbus.

Q. Did you employ iron workers on that job?

A. Pardon?

Q. Did you employ iron workers on that job?

A. Yes.

Q. Where did you secure the men you employed on that job?

A. At that time they all came out of Columbus, I believe.

Q. Columbus has a Local for the Structural Iron Workers?

A. That is right. It was local men from Columbus plus what men we took with us.

Q. So that work was outside the jurisdiction of Local 207; wasn't it?

A. That's right.

Q. It was governed by the collective bargaining agreement that is in effect for the iron workers down in the southern part of Ohio?

A. That is right.

Q. Wasn't covered by the collective bargaining agreement [fol. 340] that you had with Local 207?

A. No.

Q. Then did you have some jobs in May?

A. Yes, sir. Probably some of those jobs run over into May. There is one at Sharon Steel Corporation in May, Sharon, Pennsylvania; then Youngstown Sheet and Tube, Campbell; Jackson Iron and Steel in Jackson, Ohio.

Q. All right. At the Youngstown Sheet and Tube Company job that you had in this area, how many people were employed on that job?

A. I could not tell; possibly 15. It was repairing some ore bins.

Q. Could you tell me approximately the number of jobs that you have listed there for the year 1955?

A. 1955?

Q. Well, 1954; I am sorry.

A. Possibly 30.

Q. And on those jobs, you employed a total number of how many men, either superintendents or foremen?

A. Well, they varies, depending upon the size of the job; you may have a superintendent, foreman on one job; you may have a superintendent and maybe 10, 12, 15 foremen; varies depending on the size of the job.

Q. You have with you a list of the men who were employed in supervisory capacity on those jobs?

[fol. 341] A. Yes.

Q. Would you refer to it, please. Will you give the names of the foremen and their ages and the names of the superintendents and their ages?

A. For that year?

Q. For that year.

A. Here we go. Job at Crucible Steel, Midland, Pennsylvania; this was earlier, in March, from January to March.

Earl Iman, 49; Henry Brown, 34; James Tranerri, 39; James Conway, 24; Glen Martin, 45; George Hafmiester, 41; Howard Millikin, 38; Nickolas Millesto, 33; another job at Ford Motor Company, Dearborn; Glen Martin, 45; Mick Petro, 31; James Parossi, 33; Earl Iman, 49; William Willis, 59; Jack McDoughty, 56; job at Sheet and Tube, Youngstown; Glen Martin, 45; John Moore, 30; John Hanahan, 53; Jack Jearle, 41; James Tranerri, 39; job Republic, Cleveland; Glen Martin, 45; John Petro, 59; Mick Petro, 31; John Gross, 50; Nick Seman, 49; job at Shenango at Sharpsville; Clarence Drosby, 44; Glen Glacomb, 41; James Parossi, 33; Louis Shane, 36; Andrew Gyle, 37; John Petro, 59; Mick Petro, 31; Leo Durkin, 36; James Tranerri, 39; Charles Bonwick, 43; Ernest Estes, 32; that was a continuation of that job—

The Court: Is this all necessary, sir?

Mr. Green: I could ask him to summarize.

[fol. 342] Q. Do you have anybody listed as a foreman or superintendent who was over the age of 65 in 1954?

A. Jacob Perko, 67. Over the age of 65?

Q. Yes.

A. That is all, I believe.

Q. Just Jacob Perko; and he was employed by your company until March; is that correct?

A. That is right.

Q. Now, in the year 1955, did you have anybody employed in the capacity of a superintendent or foreman who was age 65 or over?

A. No, sir.

Q. Is the answer, "no, sir"?

A. No, sir.

Q. And in the year 1956? Did you have anybody employed in the capacity of foreman or superintendent age 65 or over?

A. No, sir.

Q. Does your company have a policy on hiring men over 65?

A. No.

Q. You have no policy?

A. No; we have had fellows there 80 years old.

Q. In construction jobs?

A. No. The Pollock Company, you said.

Q. But on construction, erection work, do you have any- [fol. 343] body over 65?

A. Yes; I have had men just recently 67, 68 years old.

Q. In a supervisory capacity?

A. Foremen.

Q. Would you name one?

A. Leroy Madison, 67.

Q. Is he an iron worker?

A. No. I believe he was a boilermaker. I would not swear to that. It was a job at E. J. Leveno Company in Sharon, Pennsylvania. That was as far as I got in 1957, probably, just part of them; we could not complete the year.

Cross examination.

By Mr. Goldberg:

Q. Mr. Walsh, all of these jobs that you listed in 1954, you say there were about 30 jobs?

A. Approximately that.

Q. If Mr. Perko's trouble with his Union had been straightened out, would your company have hired him for any of these jobs?

A. Possibly, yes; sure. He had been working with us right along.

Q. In your opinion as his representative of his employer, [fol. 344] was Mr. Perko competent?

A. Yes.

Q. Did he know his business?

A. Yes, he did.

Q. Was the company satisfied with Jake's work?

A. Yes, sir.

Q. If Mr. Perko applied for work today and he was straightened out with the Union, would the company hire him today?

A. Well, I would—73, older today than at that time. Yes. I'd still say probably a good man. I'd have to say that.

Mr. Goldberg: Thank you.

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[fol. 346] Whereupon, the Defendants called T. B. CAMPBELL, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. State your name.
A. Thomas Bruce Campbell.
Q. Where do you live?
A. West Middlesex, Pennsylvania.
Q. What is your occupation?
A. Contractor.
Q. What is the name of the company that you represent?
A. Bruce Campbell Construction Company.
Q. What kind of work does the Bruce Campbell Construction Company do?
A. Steel erection.
Q. How long has your company been in existence?
A. Oh, 15, 20 years.
Q. Were you operating as a construction company in the year 1953?
A. Yes, sir.

[fol. 347] Q. Does—or is your company under contract with Local Union 207?
A. It is.
Q. Is Local No. 207 the bargaining agent for the iron workers that you employ in this area?
A. It is.
Q. And do you employ iron workers?
A. I do.
Q. Have you ever been advised, were you advised in the year 1953 or 1954, that your company was not free to employ Mr. Perko, by Local Union 207?
A. I never was. Nobody ever said anything to me about it.
Q. No member of the Local Union advised you of that?
A. Nobody.
Q. Any officer of the Union?
A. No.

Q. Mr. Campbell, under your collective bargaining agreement, who has the authority to appoint superintendents?

A. I do.

Q. Does the Union have any say-so as to who you employ in the capacity of a superintendent?

A. No.

Q. Does the Union have any say-so as to who you may employ in the capacity of a foreman?

[fol. 348] A. No, sir.

Mr. Green: That is all.

The Court: Can you appoint a foreman who is not a member of the Union?

The Witness: To do structural iron work?

The Court: Yes.

The Witness: No, sir.

Cross examination.

By Mr. Goldberg:

* * * * * * *

[fol. 351] Q. Do your superintendents carry iron workers cards?

A. My superintendents carry iron workers cards.

Q. Have you got any superintendents that have been with you for more than a year?

A. I have.

Q. What is the longest period of time you have had one superintendent with you?

A. As a superintendent?

Q. Yes.

[fol. 352] A. I would say about 15 years.

Q. During that period of 15 years, has he worked for any other employer other than yourself?

A. Yes.

Q. Well, have you got any superintendents that have worked exclusively for you during the past five years?

A. No.

* * * * * * *

[fol. 356] Whereupon, the Defendants called ROYSTON POWELL, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. State your name, please?

A. Royston Powell.

Q. Where do you live, Mr. Powell?

A. In Youngstown; in Poland, actually.

Q. By what company are you employed?

A. General Riggers and Erectors, Incorporated.

Q. What is the business of General Riggers?

A. We handle machinery, install machinery in steel mills and other type of manufacturing.

Q. In connection with the work performed by your company, do you employ iron workers?

A. Almost exclusively in this type of work.

Q. Are the iron workers that are employed by your company in this area represented for collective bargaining purposes by Local Union No. 207?

A. That is right.

[fol. 357] Q. Was your company operating in this area in the year 1953?

A. Yes.

Q. For years before that?

A. Yes.

Q. You have been here continuously since 1953?

A. We established an office here in 1953, I think it was.

Q. Now, who does the hiring of iron workers for your company?

A. Normally, I do.

Q. Mr. Powell, have you at any time in the year 1953 or 1954, any year thereafter, been advised by members of Local Union 207 or by officers of that organization that your company could not hire Mr. Jacob Perko in any capacity?

A. They have never told me I could not hire anyone.

Q. Mr. Powell, who hires superintendents for your company?

A. I am sorry?

Q. Who hires men engaged as superintendents for your company?

A. They are usually permanent employees of ours who have worked with us through the years.

Q. Does the Union have any right to tell you who may be worked as a superintendent?

A. No.

[fol. 358] Q. Who determines who is to be employed in the capacity of a foreman?

A. We do on the job.

Q. Does the Union have any right to tell you who may be hired as a foreman?

A. No, they don't.

Mr. Green: That is all.

Cross examination.

By Mr. Goldberg:

Q. Mr. Powell, your foremen have to give orders to the men, don't they?

A. Our superintendent gives orders through the foremen to the men.

Q. Well, a man can't work as a foreman unless he can give orders; isn't that so?

A. Yes; but the orders originate with our superintendent.

Q. And those orders that originate with the superintendent come down from the company, they are more or less management speaking; isn't that right?

A. Once we put a superintendent on the job, he runs that job. Unless it is a policy matter, we never interfere after that.

Q. And this superintendent, in order to be effective, must be able to give orders to the foremen; isn't that so?

[fol. 359] A. That is right.

Q. And the foremen, in turn, in order to be effective, must be able to give orders to the craftsmen on the job?

A. That is right.

Mr. Goldberg: Thank you, sir.

The Court: Thank yo

(The witness stepped down.)

Whereupon, the Defendants called GEORGE E. MACDONALD, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. State your name, please?
A. George E. MacDonald; M-a-c.
Q. Where do you live?
A. 4410 Euclid Boulevard, Youngstown.
Q. By whom are you employed?
A. Hunter Construction Company.
Q. What is your job with the Hunter Construction Company?
A. At the present time I am a purchasing agent, the last [fol. 360] few months.
Q. Before you were purchasing agent, what was your job?
A. For about two years before that, equipment manager.
Q. What is the kind of work the Hunter Construction Company does?
A. Primarily, the erection and dismantling of structural steel buildings, bridges, overhead cranes and that sort of thing.
Q. Does your company employ iron workers?
A. Yes, sir.
Q. Are those iron workers represented for collective bargaining purposes by Local 207?
A. That is right.
Q. Youngstown, Ohio?
A. Yes, sir.
Q. Were you in the employ of the company in 1953?
A. Yes, sir.
Q. Were you familiar with the collective bargaining agreement that was then in effect between the company and Union at that time?
A. Yes, sir.
Q. In the year 1953, do you know whether your company was advised by the officers of Local 207 or by any of its members that it was not free to hire Mr. Perko?

A. No, sir, I do not.

[fol. 361] Q. Pardon?

A. I do not know of any communication or any information ever reached our office to that effect.

Q. Has your company at any time been advised by the Union that it could not hire Mr. Perko in the capacity of a foreman or superintendent?

A. Not to my knowledge.

Q. All right. What officer of the Union, that is, of Local 207, does your company look to for the purposes of making committments on behalf of you?

A. That, naturally, is the business agent.

Q. Who determines who is to be employed in the capacity of superintendent by your company?

A. Superintendent you are speaking of?

Q. Yes.

A. The Hunter Construction Company decides who is going to be superintendent.

Q. Does the Union have anything to say about who is to be employed in the capacity of superintendent?

A. No way, shape or form, no, sir.

Q. Who determines who is to be engaged in the capacity of a foreman?

A. Usually, that is done by the superintendent on the job to decide for himself who shall be the foreman of the men that are on the job.

[fol. 362] Q. Does the Union have any right to tell the company as to which of the men that it employs would be a foreman?

A. They do not.

Q. Does the Union ever attenfpt to tell you who may be employed as a foreman?

A. Never attempt to tell you. You can ask if there is any one man they might be sending you who would be suitable for a foreman; they might name two or three men if you don't know the men. This I speak of in a case where you are in a strange area. I am not speaking of Youngstown. If we would go to Charleston, West Virginia, our superintendent might not know one man from the other. He might request men from the Hall and ask the business agent if he could recommend any of the men he is going

to send who could serve as foreman. However, supposing five or six men were sent out on the job; after three or four days he might put the man in charge that was recommended by the Union and after several days' work he finds out there is a better man in that gang, therefore, the one man would be reduced to journeyman and the other man elevated to the foreman, at the discretion of the superintendent of the company.

Q. Does the Union have any right to question the discretion of the company?

A. They have no right even to contest the fact that you did not keep the man they recommended on there. It is up to you entirely if you want to change those men.

[fol. 363] Mr. Green: That is all.

* * * * * * * *

[fol. 364] Whereupon, the Defendants called GARON KELLY, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Green:

Q. State your name, please?

A. Garon Kelly.

Q. Where do you reside?

A. Walton Hills, Ohio.

Q. By whom are you employed?

A. Hunkin and Conkey Construction Company, Cleveland, Ohio.

Q. What is your job with the Hunkin and Conkey Construction Company?

A. General superintendent over all the iron workers and millwrights.

Q. Does the Hunkin and Conkey Construction Company have work in this area, in the vicinity of Youngstown, Ohio, during the last several years?

A. They have. They have built the Warren Sewage Plant. We started approximately two years ago. Now they [fol. 365] have a job at Republic Steel in Warren, which has been going approximately a year.

Q. All right. Do you know whether the Hunkin and Conkey Construction Company had work in this area during the years 1953 and 1954?

A. That I cannot answer. I was not in this area at that time.

Q. Do you know whether the Hunkin and Conkey Construction Company has been advised by the officers of Local Union 207 or by any of its members that the company could not employ a Mr. Jacob Perko?

A. They have not.

Q. The company has not been so advised?

A. They have not. I am the one that does all the negotiations with the Union as far as the work goes, I mean they work directly under me.

Q. And are you saying you have not been so advised by any member of the Union or by any officer of the Union?

A. No, sir.

Q. Do you have an agreement with Local 207?

A. Yes; yes we do.

Q. Do you recognize Local 207 as the bargaining agent for the men you employ in the capacity of iron workers?

A. Yes, sir.

Q. Now, what officer of that Union do you look to for [fol. 366] the purposes of making commitments for and on behalf of the Union?

A. Mr. Thomas.

Q. What is his position?

A. The business agent for the Iron Worker Union.

Q. Do you know of any other officer in the Union who has authority that the company looks to to make commitments?

A. There is no one they look to outside of the iron worker business agent.

Q. With the Hunkin and Conkey Construction Company, who makes the determinations as to what men may be employed in the capacity of superintendent?

A. Myself.

Q. Does the Union have any say-so in that matter?

A. No, sir.

Q. Who makes the determination as to who is to be

employed in the capacity of an iron worker or, rather, of a foreman?

A. Myself and the superintendent on the job.

Q. Does the Union have anything to say about that?

A. No, sir.

Q. And that is solely your province?

A. Yes, sir.

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[fol. 369] Mr. Green: If it please the Court, a deposition was taken of a witness. May I read it to the jury?

The Court: Yes.

Mr. Green: This is a deposition of a witness, Mr. Laurel A. Lawson.

Mr. Green: (Reading) "Whereupon, at the request of the witness and by further agreement between counsel, the commissioner, counsel, and the witness met at The Spalding Hotel, Duluth, Minnesota, Room No. 200, and, beginning at about 9:30 a.m., central standard time, the following proceedings were had:

"Thereupon, Mr. Laurel A. Lawson, of lawful age, being by me first duly sworn, as hereinafter certified, deposes and says as follows:

Direct examination of Mr. Lawson.

By Mr. Schiavoni:

[fol. 370] Q. Would you state your full name, please?

A. Laurel A. Lawson.

Q. And 'Laurel' is L-a-u-r-e-l?

A. Right. Now, it's very seldom I tell that.

Q. And where do you live, Mr. Lawson?

A. Now?

Q. Yes.

A. 907 North 56th Avenue, West.

Q. Duluth, Minnesota?

A. That's right.

Q. What is your occupation, sir?

A. Construction superintendent for American Bridge, Division of U. S. Steel.

Q. And, sir, how long have you been employed as superintendent for the American Bridge Company?

A. Oh, 15 years approximately.

Q. Were you employed by the American Bridge as a superintendent in Youngstown, Ohio, during 1954?

A. Right.

Q. As a job superintendent for the American Bridge Company, what were some of your duties, sir?

A. Well, just what do you have reference to?

Q. Well--

A. To get the job done; to do structural steel work was the duties of the job.

[fol. 371] Q. All right. Did you have the further duties of employing personnel for the jobs?

A. Sure.

Q. Did you know a man by the name of Jacob Perko?

A. I know Mr. Perko, yes. I never was too well acquainted with him, but I met him on different occasions.

Q. I see. And had you known him prior to 1954?

A. I had met him prior to that, yes.

Q. Do you recall, Mr. Lawson, whether Mr. Perko applied for a job with you at the American Bridge Company at Youngstown during the year 1954?

A. I wouldn't say that it was '54. Jake did come to my job and said that he might be looking for a job.

Mr. Goldberg: Wait a minute. Objection to the hearsay, as to what he said.

Mr. Schiavoni: Well, of course, I will proffer it anyhow.

Mr. Goldberg: All right.

Q. Did he ask you if he could have a job with your company?

A. I don't know whether he directly asked me for a job or not. It was indicated in our conversation that Jake might want a job, but whether he asked directly for a job or not, I just won't say.

Q. Well, at that time was there work available for Mr. Perko?

[fol. 372] A. At that time I did not have a job available for Jake, no.

Q. And what kind of a job was Mr. Perko seeking?

A. Well, I don't remember that he actually specified any

particular job, but it was common knowledge around in the Youngstown area that Jake was a blast furnace man, and that would have been the type of work that I would have wanted him for, had I had a blast furnace going at the time.

Q. I see. The supervision and with the tools of supervision; that would be as a foreman?

A. That is right, as a foreman.

Q. Sir, while in Youngstown you did hire some personnel; is that right?

A. Oh, considerable.

Q. All right. And what procedure did you follow in hiring the people there at Youngstown?

A. Well, if I couldn't—if I couldn't find the men that I wanted, then I would contract the iron workers' or boilermakers' Locals.

Q. Did you first make an endeavor to find the men on your own?

A. Sure.

Q. Would that be by going to the gate?

A. Not necessarily. I would call, or the men would call me from the gate, or I would go to the gate if I happened [fol. 373] to know men were at the gate.

Q. I see. And you had been around Youngstown some time prior to that, had you not?

A. I went to Youngstown in February of 1950.

Q. So that you by 1954 knew a good many boilermakers and iron workers?

A. Right.

Q. Now, did Local 207 of the iron workers have any control over whom you employed in the capacity of a foreman or a superintendent?

A. No.

Q. Did the Union in any way have anything to say about whom you might hire as a foreman or a superintendent if you were looking for one?

A. They never questioned me. I might have asked for information if I couldn't find a foreman. In fact, I have asked Bill Thomas, who is the business agent for the Local there; I have asked him to recommend men for me.

Q. Now, Mr. Lawson, had Local 207 through its members or any of its officers advised you or anyone connected with

your company either directly or indirectly that Mr. Jacob Perko could not be hired by your company in a supervisory capacity?

A. No.

Q. And again I ask you: Had work been available back in 1954 when Jake came to you, would you have hired Mr. [fol. 374] Perko despite the fact that he told you that the Union had barred him from acting as a superintendent or a foreman?

A. Probably would have.

Q. And again, then, do you recall talking with Mr. Perko—

A. I did, yes.

Q. —about a job, but at the time you had no work for him; is that correct?

A. That is right. Now, I might state at this time that it was just a little bit hard for me to understand everything that Mr. Perko said. I was not with him enough or associated close enough with him to be able to just understand everything that he said, and whether or not he directly asked me for a job or whether he didn't, I don't know; I couldn't say.

But I will say this: That had I had a blast furnace job going at the time when he was available, I would certainly have given him a job, because he had been recommended to me by Bill Thomas as the best blast furnace man in that area.

* * * * * * *

Cross examination of Mr. Lawson.

[fol. 375] By Mr. Goldberg:

Q. All right. Now, Mr. Lawson, you were acquainted with Jake's reputation as a good blast furnace man—

A. Right.

Q. —before he ever contacted you, weren't you?

A. In fact, I tried to get him one time when he was working for another company.

Q. All right. Now, do you recall this instance when Jake did go out to see you?

A. He came out to the plant.

Q. He came out there to talk to you?

A. What?

Q. He came out there to talk to you?

A. Yes.

Q. You had more than one trick going, didn't you; that is, you had more than one shift of men going on that job, didn't you?

A. I wouldn't say whether I did at that time. I did at various times, but at that time I don't know whether I had more than one shift going or not.

Q. Isn't it a fact you were looking for a night foreman?

A. I don't remember whether I did or not.

Q. Don't you recall asking Jake to try to get you a man for the job; didn't you also discuss that job with a man named Martin?

A. Don't remember that, no.

[fol. 376] Q. Didn't you request Jake to help you try and get a man since he couldn't take the job?

A. I don't remember doing that, no.

Q. Did you ever have any discussion with a blast furnace man named Martin?

A. No.

Q. Did you ever hear of a man named Martin in the blast furnace work?

A. No, I don't remember the name at all.

Q. Have you ever had any labor difficulty at all with the Structural Iron Workers Union?

A. Oh, we had our disagreements, yes. I didn't agree with all of their thinking.

Q. Did you ever have any work stoppages down there?

A. Not stemming from anything direct, no. There was; I believe, one work stoppage that I think was caused by the boilermakers' throwing up a picket line or something like that, but not through the iron workers.

Q. And you don't recall today because, you say, of the language barrier between you and Jake; you don't know what he was actually talking about when he went out to see you at that time, is that right?

A. I couldn't understand all of what Jake said, no.

Q. So you don't remember whether Jake was asking you for a job or telling your his troubles; is that right?

[fol. 377] A. Well, I could understand some of the things he said. I could make out some of the things he said, but I couldn't understand everything, and I hated to embarrass him by continuing to ask questions.

Q. Did he discuss with you the fact of his foreman's rights being revoked?

A. He did say something about that. Now, he mentioned either then or I heard later—and I won't say which—that they were taking away his Union rights as an iron worker, and that he either had or was planning to join the Boilermakers Union.

Q. All right. Now, if his foreman's rights were revoked and you had work available, would you hire him as a foreman?

A. I had never been told anything other than what he told me himself, and if I had had a job for him, a blast furnace job, at the time, I would have put him to work. I probably would have called the Union and asked them about him, but I didn't, because I would have given him the job first.

Q. I am saying this: If a man's foreman's rights were revoked, would you hire him as a foreman?

A. It's something I never had to contend with. I don't know.

Q. I mean a foreman, part of his duties requires giving orders to the craft as the foreman; isn't that correct?

A. Right.

[fol. 378] Q. And if the members of the craft refuse to take the orders, then he loses his utility as a foreman; isn't that so?

A. Well, that probably would be true, yes.

Q. And in such an event you would have no need for him; isn't that so?

A. Well, I didn't know—at the time I had never been notified by any Union member that he was not in good standing as far as the Union was concerned.

Q. That isn't what I asked you, Mr. Lawson. What I am asking is this: Would you have hired Jake as a foreman if you had knowledge that his foreman's rights were revoked and that the men would refuse to take orders from him? That is the question I am asking you.

A. It's a pretty hard question to answer, because there are a lot of things that enter into the picture.

Q. Well, you couldn't tell me whether you would or you wouldn't?

A. Well, I would or I wouldn't. That could be answered two ways. Now, I might say this: That due to the fact that the Iron Workers Union had recommended Jake Perko to me as an excellent blast furnace man—

Mr. Goldberg: Well, I want to move to strike out the answer as being not responsive to my question.

A. (Continuing) Well, I think I will answer that for you. [fol. 379] I would have hired Jake if I had had a blast furnace job going and then let the Union tell me later that I couldn't work him.

Q. Well, if the men would refuse to take orders from a foreman that is running, say, your night turn, what would your action be; what would you do?

A. Well, if the men had refused to take orders, then I probably would have called the Union and stated my case to the Union, and if the Local Union hadn't been able to justify the men going ahead and working, I would have called the International Union and found out what they could do about it.

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[fol. 380] Q. Well, didn't you have occasion to talk to Jake after that job?

A. After that job he came out to the plant some time after; I won't say whether it was two months or six months or a year or two years. I just don't remember that, because I cover a lot of territory and I don't remember all those dates. But Jake did come out to the plant afterwards and talked to me, something about a job; whether he wanted to go to work then or whether he didn't, I just don't know.

Q. And you say you heard his foreman's rights were revoked, but you don't remember whether it came from him or somebody else?

A. He told me that that was true. Now, I gathered that much, but I couldn't understand the circumstance from what he said.

Q. But you say that you had heard that?

[fol. 381] A. Yes. I had heard it through him; he told me.

Q. I see. Well, you said before you don't remember whether you heard it from him or from somebody else?

A. Well, I heard different ones talk about it on the jŏb; I heard some of the people talk about it, that they had heard that Jake had said that.

Q. That his foreman's right were—

A. That—

Q. Now, wait a minute. You said you heard his foreman's rights were taken away?

A. I heard it.

Q. And then you heard it from him himself?

A. That's right. I had heard Jake had said that, and Jake told me that, too.

Q. You recall the conversation very clearly, and this was about when, '54 or '55 or '56?

A. Somewhere along in there. I just won't say.

Q. It was five, six years ago, wasn't it?

A. That's right.

Q. You recall this conversation very clearly; is that right?

A. Well, you mean taking his foreman's rights away?

Q. Yes.

[fol. 382] A. I remember him coming out to the plant, yes.

• • • • • • •

[fol. 388] By Mr. Goldberg:

Q. You say that at times you would have thirty foremen?

A. I have had as high as thirty foremen, yes.

Q. And at other times you are down to two or three?

A. That's right.

Q. You are the fellow that hires them?

A. I did, every one of them.

Q. And you are the one that directs where they are going to work and what they are going to do?

A. Exactly.

Q. And over this seven-year period in Youngstown, you remember very vividly this conversation you had with Jake Perko on this one occasion?

A. Yes, but just what year that was I wouldn't say.

Mr. Goldberg: All right, that's all.

Further recross examination of Mr. Lawson.

By Mr. Goldberg:

Q. Mr. Lawson, you say that U. S. Steel has a policy of retiring all men over 65?

[fol. 389] A. Right.

Q. They will not hire a man over 65?

A. Right.

Q. And this company you work for is a subsidiary of U. S. Steel?

A. We are a division.

Q. A division of U. S. Steel?

A. Yes.

Q. Did you say that at the time you were talking to Jake you had no idea from his physical appearance—

A. No, I never would have dreamed that he was that old.

Q. —that he was over 65?

A. No.

Q. You had no inkling whatsoever?

A. None whatsoever. That surprises me.

Q. His physical appearance to you, then, was good?

A. Sure, it was.

Q. He looked like he was capable of handling a job?

A. But the minute I started to sign that man up, right then I would have been 'in the soup.'

Q. Actually you couldn't hire a man over 65?

A. I couldn't.

Mr. Goldberg: (To counsel:) Do you want to add anything to it?" (Reading ceased.)

Mr. Green: (Reading:)

[fol. 390] "Redirect examination of Mr. Lawson:

By Mr. Schiavoni:

Q. And had you given him a job and taken his application, you would not have been able to keep him, had he revealed that he was over 65?

A. No, I would not.

Mr. Goldberg: But, of course, at the time, you didn't know that?

The Witness: No.

Mr. Schiavoni: All right, that's all.

Mr. Goldberg: That's all." (Reading ceased.)

* * * * * * *

[fol. 391] Whereupon, in Rebuttal, the Plaintiff called LOYLE D. RAWLINGS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Goldberg:

Q. State your full name.

A. Loyle D. Rawlings.

Q. Where do you live?

A. 1618 West Park, now, sir.

Q. Mr. Rawlings, taking you back to the year 1956, can you tell me where you were employed during that year?

A. That was the Niles Machine and Welding in Niles.

Q. And what was your job, sir?

A. I was a foreman.

Q. And during that year, did you have a Mr. Jake Perko working under you?

A. Yes, I did.

Q. Is this the gentleman that you had working?

A. Yes, it is.

Q. You were the foreman?

A. Yes, sir.

[fol. 392] Q. What type of work was Jake doing on that job?

A. I was using him as a fitter.

Q. Can you tell me about what that type of work requires?

A. Well, he has to read blueprints and take the material that has already been cut and shape and put it together according to the blueprint and tack it and have it ready to go into welding.

Q. Do you recall if Mr. Perko was a full-time worker at that time?

A. Well, he was more or less part-time; we had hired him as full-time, but then he was working full-time, yes.

Q. Do you recall what months he worked for the company?

A. It was the first part of the year; I can't give you the exact time now. I don't recall the exact months it was, but it was the first part of the year, I know that.

Q. Do you recall at the time Mr. Perko left the company whether or not he had been advised that he was going to be laid off?

A. Oh, yes, I had a habit of doing that. If things got slack and I knew it was coming, I'd tell the fellows, well, things are getting down to where we are going to start laying off, and give them fair warning. I always did.

Q. Well, on Mr. Perko's separation slip, it said the reason for leaving was retiring. Did Mr. Perko at any time indicate to you he was going to quit working or retire?

[fol. 393] A. Not until after I had mentioned to him that we was going to cut back on our force.

Q. Well, following his leaving employment with the Niles Welding Company, did you get a job with another company?

A. Yes; I left there.

Q. Where did you go to work following that?

A. Youngstown Steel Tank.

Q. And were you able to obtain a job for Mr. Perko there too?

A. Yes, I did.

Q. And was that a full-time job you got for him?

A. Yes; it was.

Q. And do you recall what type of work Mr. Perko was doing on that job?

A. He was doing fitting.

Q. Somewhat in the same nature as the one in Niles?

A. Yes.

Q. Was Mr. Perko a competent worker?

A. He was.

Q. You were the gentleman that was responsible for getting him the job with the Youngstown Steel Tank; is that correct?

A. Yes.

Q. Were you working on the same turn with him?

A. No; I was working on day-turn; he was working on [fol. 394] afternoon turn.

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[fol. 397] Whereupon, in Rebuttal, the Plaintiff called PAT PILORUSSO, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Goldberg:

Q. State your full name.

A. Pat Pilorusso, P-i-l-o-r-u-s-s-o.

Q. What is your occupation?

A. Contractor.

Q. Where do you live, sir?

A. 4999 Greenbriar Drive.

Q. Try to speak up so I can hear you back here. What is your business, sir?

A. Structural contractors.

Q. How long have you been engaged in that business, sir?

A. Since '46.

Q. Are you a member of the Local Contractors Association?

A. Yes.

Q. And in your work, sir, what crafts do you employ?

A. We employ iron workers, laborers; sometimes we employ carpenters.

[fol. 398] Q. Mr. Pilorusso, during the period of time that

you have been in business as a contractor, have you had any dealings with Mr. Thomas of Local 207?

A. Yes.

Q. Have you had any difficulty in obtaining iron workers, Union members, for different jobs that you have had during the years?

A. Would you repeat that?

Q. Have you had any difficulty in obtaining Union men from Local 207 to perform work on different jobs of yours? Have you had any trouble getting Union men?

A. When they were not available, yes.

Q. And when Union men were unavailable, what did you do?

A. I used whatever method I could use. In other words, I picked up whatever I can.

Q. Did you obtain permission from Local 207 to use non-Union men?

A. Yes.

Q. And was there a period of time where you were using non-Union men for several years?

A. Well, I had two on my payroll, yes.

Q. Will you tell us, in your own words, what happened as to those men that were on your job for that two-year period?

A. Well, the strike came in the mills, he said that I should lay them off and hire the members, which I did.

[fol. 399] Q. And will you tell us what happened following that?

A. Well, I did employ the iron workers. Then, well, they went back to the mills; naturally, I was left with no men.

Q. What happened?

A. I went back and got the one that was working for me then.

Q. At any time during the operation of your business in the past ten years, was there ever a time that you were forced to employ men that you didn't need?

A. There was only one incident that happened.

Q. Will you tell us about that, please?

A. I had a fellow that was working with the raising gang on the crane; and I just don't recall what job it was.

but anyway, he quit, whatever he did, I don't remember. So I got my foreman, and I instructed him to take the crane and the crew, get himself a crew, to go to Palmyra, we had a bin out there; so he took the crew and went out there. Then I received a call, the time we were working at the YMCA, and Frank Esso called me that Mr. Thomas had John Donnity up there. And I said, "Well, what does he want?" He said, "Well, he told him that they should hire Donnity because he was the steward." And I said, "Frank, don't you have five men there?" He said, "Yes, we have five men plus we had nominated the steward." So he told Frank that he should hire Donnity or else that job would have been stopped.

Q. Did you hire Donnity?

[fol. 400] A. Well, then I talked to Mr. Thomas; and Mr. Thomas told me over the phone, I think I can recall that, and said that either John Donnity goes to work on that job or that job will be stopped.

Q. Did you then hire John Donnity?

A. Well, to avoid any trouble, what else could I have done. I didn't want to stop my job; so I hired John Donnity, yes.

Q. Did you need John Donnity at the time?

A. I had the full crew.

Q. Before you hired him or after you hired him?

A. Well, before I hired John Donnity I had a full crew.

Q. I see. Was there any qualified man that had worked for you on occasion that was prevented from working for you?

A. Well, there is a few, yes.

Q. Do you recall any of their names?

A. Well, there are two guys that worked for me; and—well, Watson, he worked for me also. He had been trying to get a book; I wanted to employ him. He just couldn't get a book here, just couldn't employ that man. That's all.

Q. Had Mr. Watson worked for you on occasion?

A. Yes.

Q. Was he qualified?

A. I'd say he was.

Q. Was he competent?

A. Yes.

[fol. 401] Q. And was he ever called off the job, one of your jobs, when he was working for you?

A. Well, I can recall once; he come out and he got himself a book and the way they work here, if they have their own men loafing—in other words, an outsider does not have a chance as a Local man; the Local man has privilege over the outside.

Q. Yes.

A. So he was an outsider. They told him there were men loafing; and he could not work. I just don't know how it came about.

Q. Well, was he taken off your job then?

A. Well, he was taken off the job, because you have to have—cleared through the Hall. You have to be cleared through the Hall to work here.

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[fol. 402] Cross examination.

By Mr. Green:

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[fol. 403] Q. Mr. Pilorusso, who has the right to tell you or who makes the determination who may be employed as a superintendent by your company?

A. Well, I try to pick the best that I can, that I think I know; try to pick the people that are qualified for the job.

Q. Does the Union have any right to tell you who you may use as a superintendent?

A. No.

Q. Does the Union ever tell you—try to tell you who you may use as a superintendent?

A. No.

Q. And does the Union have any right to tell you who you may use as a foreman?

A. No.

Q. Has this Union ever tried to tell you who you may use as a superintendent or foreman?

A. No; superintendent or foreman, no.

Q. Has this Union ever told you that you may not employ Jake Perko?

A. Well, I worked for Jake Perko. Jake Perko never worked for me.

Q. Has this Union ever told you, Local 207, ever come to you and say you may not hire Jake Perko?

A. No, they never did to me; no.

Mr. Green: Thank you.

[fol. 404] Redirect examination.

By Mr. Goldberg:

Q. As a practical matter, Mr. Pilorusso, if you hire a superintendent, if the men refuse to take orders from him, would you continue to employ him?

A. Well, naturally, if they take orders, if I hire a man and the iron workers refuse to take orders, my next thing is to either try to find somebody else that works with the foreman or try to get rid of the foreman and use what you got on the job. After all, if there is a friction between the foreman, that is your leading man; and if the workers don't take his orders, what good is that to me.

Mr. Goldberg: Fine. Thank you, Mr. Pilorusso.

Mr. Green: That is all.

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[fol. 405] Whereupon, in Rebuttal, the Plaintiff called Calvin Watson, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. Goldberg:

Q. State your name.

A. Calvin Carl Watson.

Q. Where do you live, Mr. Watson?

A. Oak Street Extension, R. D. #1, Lowelville.

Q. What is your current occupation, sir?

A. Employed at the Pittsburgh Lake Erie Railroad.

Q. What sort of work do you do?

A. Fireman.

Q. Mr. Watson, you will have to speak up so I can hear you back here, please.

Q. Mr. Watson, have you ever worked as an iron worker?

A. Yes, sir.

Q. Do you recall what years it was that you worked as an iron worker?

A. Well, it started around '51. Off and on I tried to [fol. 406] get into the Local; and I worked—Mr. Pilorusso a little bit, and my brother was an iron worker. He tried to get me in and several people took me up to the Union Hall and introduced me to Mr. Thomas and a few people there. I kept going back. He kept saying come in next week or next month, something like that; and then one evening on a Union meeting I went up and asked Thomas, and he says, "Well, it is closed right now. If somebody dies or retires, there might be an opening. Come in then." Well, it was not long after that when my brother was killed, and he had an iron worker's book. And after everything was settled and everything, I remember—if I took the book in there or my Dad took it in there, I went in and asked Mr. Thomas if I could have his book, I figured I was entitled to it as much as anybody else; and Mr. Thomas said, "Well, you come back in a week or so." So I went back in in a week, maybe two weeks, and he said, "You are not getting a book here, just don't have any work." That's all. "You are not going to get a book." I says, "If I can't get one here, I will get one someplace else." He said, "Don't come back here in Youngstown, because you'll never get a job." So I was kind of disgusted. Then there was a lot of work in town, and I looked around, talked to different people where I could get a book, studied up a little more about iron working; and—

Q. Did you obtain another book?

A. Yes.

. . . . . .

[fol. 408] Q. Mr. Watson, was there any specific occasion that you were taken off a job when you were working by either Mr. Thomas or the executive board?

A. Yes; after that job was finished, I come back into Youngstown into the Hall one morning and asked if they

had any work. Mr. Thomas was there. He says, "No, not yet, nobody has called in yet." Mr. Thomas left and I went and waited around. I figured I was the only man there, I might get a job.

Q. Did you get a job following that?

A. Mr. Pilorusso walked in and asked if they had any-[fol. 409] body. The secretary said no, they had nobody available.

Q. Did you go to work for Pilorusso?

A. He says, "Come on; I need somebody to fill a crew." I went up on a job on South Avenue. I worked there that day. It was on a Friday. And Mr. Donnity asked for my book to take into the Local. When he come back, he said, "You are not allowed to work no more. That is the word from Mr. Thomas, you are not allowed to work any more."

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[fol. 410] Whereupon, in Rebuttal, the Plaintiff called JOHN EMANUEL, who, being first duly sworn, testified, as follows:

Direct examination.

By Mr. McDonald:

Q. State your name, please?

A. John Emanuel.

Q. Your address?

A. 31 Grimm Heights, Struthers, Ohio.

Q. And your present occupation?

A. Masonry contractor.

Q. Mr. Emanuel, have you ever been a member of Local 207 of the Iron Workers Union?

A. Yes.

Q. When was that?

A. Around 1952.

Q. And as a member, did you know Mr. William Thomas?

A. Yes.

Q. What was your classification when you were an iron worker?

A. Apprentice iron worker.

[fol. 411] Q. Now, were you ever employed by Delbert Smith Construction Company at U. S. Steel, Ohio Works?

A. Yes.

Q. What year was that, approximately?

A. Approximately 1952.

Q. And in what capacity were you employed on that job?

A. Sheeter.

Q. That is, you were an iron worker; is that correct?

A. Yes; sheeter.

Q. A sheeter is a type of iron worker?

A. Yes.

Q. How long did you work on that job?

A. Do you mean the length of time as a sheeter?

Q. Yes, sir.

A. About three weeks.

Q. Well, then what happened?

A. Then the company gave me a job as a supervising the whole job.

Q. Were you still a member of the Iron Workers Union at that time?

A. Yes.

Q. Dues paying member?

A. Yes.

Q. How did you obtain your employment there at the Delbert Smith Construction Company?

[fol. 412] A. D. L. Smith called the Hall; I was at the Hall, and he gave me one of the jobs; sent me out there as a steward of the job.

Q. Who sent you out there?

A. Bill Thomas.

Q. I see. Now, how long did you work as the supervisor on that job?

A. About six months.

Q. Well, can you tell the jury what happened on that job as far as Local 207 is concerned?

A. Well, I was on the job out there, up there six months, the job was going very well—

Q. Speak up so that we can hear you down here at this end of the room.

A. —and the steward came out late three or four times; and naturally, the men won't start to work unless the

steward is on the job. Well, he came about 20 minutes late one morning and we got into an argument over it. And it was pretty hot and heavy, the argument. He ran out the gate, thought—I guess he thought I was going to punch him. He went out the gate and went to Bill Thomas that day, I assume. And the following evening or somewhere in that time there, in that week, they called me up before the board. I think it was by telephone, I'm not sure. But I went up to the board and they told me I could not run that job any more.

[fol. 413] Q. Now, who was on the board at that time?

A. Well, as far as I can recall, Bill Thomas, seems to me like I can see them all here, I can't recall all their names, Mr. Gorcas there, Roberts, Corbett; that is the only ones I can remember by name.

Q. All right. At that meeting, who officiated?

A. Well, Bill Thomas asked all the questions. The rest of them came in.

Q. And what did they tell you? What was the final result of that meeting?

A. Well, they told me that I'd have to leave the job, and I could not work on that job any more.

Q. All right. Now, at that time were you a dues paying member of this Union?

A. Yes.

Q. And what were your wages at that time?

A. I was earning $330 a week.

Mr. McDonald: That is all.

Cross examination.

By Mr. Green:

. . . . . .

[fol. 414] Q. That is the reason they gave you information telling you you could not continue to be an apprentice; isn't that true?

[fol. 415] A. I think there is one thing I'd like to explain to you is this: They did not take my book away from me; they took my job away from me. Then two weeks later that happened, they took my apprenticeship book off me.

. . . . . .

[fol. 416]

PLAINTIFF'S EXHIBIT No. 2

Dec. 4, 1953

Charges against J. Perko, Book #189154

On Dec. 4, 1953 Iron Workers were laid off Wm. B. Pollock Job Ohio Works. Jacob Perko knew at that time the Iron Workers were manning all rigs according to local agreement between Boiler Makers & Iron Workers. On Dec. 6th Jacob Perko, as a member of Local 207, started on same job with gang of 10 Boilermakers, instructing them & assisting them. At that time no Iron Workers on job and I.W. Business Agent was not notified.

/s/ THOMAS E. DOYLE 252239
/s/ LEO DURKIN 269797
/s/ WM. SCHOPPE 220413
/s/ W. S. DONITZEN 435956
/s/ BERT NOCK 185727

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[fol. 417]

WHEREUPON, BEFORE ARGUMENT, THE COURT CHARGED THE JURY AS FOLLOWS:

JENKINS, *J.*:

* * * * * * *

[fol. 419] It is the Plaintiff's contention that the Defendants acted wrongfully in that they interfered with Jacob Perko's right to employment, the securing of his discharge from the William B. Pollock Company and the prevention of his securing other work in the Youngstown area as an ironworker foreman. It is not required that the acts done to accomplish the ends be in themselves unlawful, but it is necessary that the acts be performed in furtherance of the wrongful purpose and be done by the conspirators without any justification on their parts.

It would be unlawful to secure the discharge of a foreman or supervisor to satisfy the arbitrary and capricious desires of those seeking his discharge. It would be unlawful to prevent a foreman or supervisor from obtaining employment if the same were done to satisfy the arbitrary and capricious desires of those alleged to have participated in such prevention. If such was the design and object of a concerted action by these Defendants or any two or more of them, there was a conspiracy.

To sustain the allegation of a conspiracy, the Plaintiff, Jacob Perko, is not required to depend upon positive, direct evidence entirely, that is, what the eye and ear have seen and heard respecting the unlawful plan and agreement; it may be proved and sustained by evidence establishing a concert of action in committing the unlawful or wrongful act or by proof of other material facts from which reasonable minds will be satisfied to draw the natural inference [fol. 420] that the overt act or acts done by one of the conspirators was in furtherance of the common design of the alleged co-conspirators.

If you find by the greater weight of all the evidence that it is more probably true than not that the Defendants or any number of them combined either by agreement or understanding for the purpose of interfering with Jacob Perko's employment, and if you further find from the greater weight of all the evidence that it is more probably true than not that any one of the Defendants in furtherance of the common design did an overt act, then the Court charges you as a matter of law that any person taking part either as a party to the agreement or understanding or by willfully doing an act in furtherance of the common design is liable as a conspirator. In contemplation of the law the act of one is the act of all. It is immaterial, as affecting the question of co-equal responsibility, that the Defendants or any one or more of them, or one or more of the conspirators were not actually present at the consummation of the preconcerted design, or that the act charged may not have been arranged for. Each is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences.

Ladies and gentlemen of the jury, the Court instructs you as a matter of law that the burden of proof is upon the Plaintiff, and the Plaintiff must prove his case by a pre- [fol. 421] ponderance of the evidence.

By "preponderance of evidence" is meant the greater weight of evidence. It does not mean that more witnesses have testified on one side than on the other. In other words, it does not have reference to the number of witnesses testifying, or the mere quantity of evidence, but to the quality thereof. It means, simply, that after the testimony of all the witnesses has been weighed with reference to their credibility, exactness of memory and all the circumstances surrounding their testimony, the evidence of one side outweighs that of the other. The term is used with reference to the balance or ordinary beam scale in which the weight preponderates on one side or the other, and the rule requires that one side present such evidence upon the point in question as in the minds of the jurors will be of greater weight than the evidence produced by the other side on the same point, that is, make a stronger impression upon the minds of the jury. This is determined by taking into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testified, their conduct and demeanor, their interest or lack of interest in the issues of the action, the probability or improbability of their statements and all the circumstances surrounding their testimony.

Ladies and gentlemen of the jury, I charge you as a matter of law that evidence is either positive and direct, a recital of facts testified to by eyewitnesses, or circumstantial, [fol. 422] a recital of facts or mere circumstances connecting one with the commission of an act. Inferences may be drawn from circumstantial evidence as well as from positive and direct evidence. In other words, the existence of any fact may be established by circumstantial as well as by direct evidence, provided the circumstances shown fairly and reasonably warrant the conclusion reached, or that conclusion is the natural inference from the facts proved. Positive or direct evidence consists in the recital of facts by eyewitnesses of a transaction, or by those who have actual knowledge thereof, the positive statement of a fact

under oath by a credible eyewitness. Circumstantial evidence consists of proof of certain facts and circumstances, from which you may infer other connected facts which usually and reasonably follow according to common experience.

If you find from a greater weight of all the evidence that it is more probably true than not that the Plaintiff was prevented by any acts of the Defendants from securing employment which he had sought, and if you further find that such act or acts were unjustified and that the failure to hire him was the direct and proximate result of these acts, and if you further find that the Plaintiff sustained damage as a direct and proximate result thereof, then in such event your verdict must be for the Plaintiff.

The fact that the employment is at will and that the employer is free from liability for discharging an employee [fol. 423] does not carry with it immunity to a third person who, without justification, causes the discharge of the employee.

The fact that a company is free from liability if it refuses to hire a person applying for a job does not carry with it immunity to a third person who, without justification, by false representations induces a company not to hire a person where he would have otherwise been hired.

A false representation is in itself an act done without justification.

In order that you may have a clear understanding as to the character of the wrong alleged to have been committed by the Defendant you are instructed that everyone has a right to be secure in his employment, free from the interference of others, and one may not interfere in the employment of another unless such interference is justified. In other words, an employee earning a living or otherwise enjoying the fruits and advantages of his industry, enterprise or skill has the right to pursue such employment undisturbed by unjustified interference or annoyance.

Ladies and gentlemen of the jury, I instruct you as a matter of law that if you find from a greater weight of all the evidence that the Plaintiff, Jacob Perko, is entitled to recover from the Defendants, then in such event in deter-

mining the amount of damages that you find the Plaintiff, Jacob Perko, is entitled to recover from the Defendants, such amount of damages shall not be reduced or diminished [fol. 424] by any payments or awards which may have been made to Plaintiff under the Social Security Act.

Members of the jury, I charge you as a matter of law that the trial of Jacob Perko by the Executive Board of the Defendant Union on December 8, 1953, was an exercise of a lawful right of the Executive Board of the Defendant Union.

The findings and penalty of the Local Union as modified by the International Union cannot be questioned in this Court in this proceeding.

Therefore, the trial, the findings and the penalty may not be used as evidence of a conspiracy by the Defendant Union against the Plaintiff, Jacob Perko.

* * * * * * *

[fol. 438] (Whereupon, a short discussion was had among Court and counsel off the record and out of the hearing of the jury, after which the following proceedings took place out of the hearing of the jury.)

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Green: At the end of the trial, I renew my motion to direct a verdict for the Defendants for the reason that the Plaintiff has not introduced evidence sufficient to go to a jury in support of his cause of action; and for the further reason that the acts complained of by the Plaintiff are within the protection of Section 7 of the National Labor Relations Act and may not be made a state tort action.

The Court: Overruled.

Mr. Green: Exception.

* * * * * * *

[fol. 439]

WHEREUPON, AFTER ARGUMENT, THE COURT CHARGED THE JURY AS FOLLOWS:

JENKINS, *J.*:

Ladies and gentlemen, this is a civil action for damages. In a case of this kind the jury is the exclusive trier of the facts. With these facts I have nothing to do and I am not permitted to give you any intimation, having listened to this evidence with you, as to what the probable truth in this situation is. So do not expect any help from me. Do not form any opinion from what I have said or am saying as to my opinion of facts. Nor can I help you with respect to what credence you ought to give to any particular witness. I have, of course, listened to more witnesses than you have and have perhaps developed an instinct as to whom I would believe or would not; but I cannot give you any help. That is wholly your province.

The reason we have a jury system is that based on centuries of experience our system of jurisprudence believes that if you draw twelve individuals with their varied backgrounds and experiences together and have them concentrate their attention on a given situation, that they will most likely arrive at what the probable truth is better than if it were left to one man, no matter how experienced or learned he may be. So you come here with your human faculties, intelligence, common sense, experience, and apply [fol. 440] those to the situation to find out what the facts probably were.

So you weigh these facts that you have heard, that I have permitted to go to you, and you get the impression from all you hear as to what probably happened; and you weigh not only what is said, but you weigh the sources, the witnesses, the papers, documents, whatever is in the form of evidence, you weigh it; and you can believe what you feel is credible to you or you can disbelieve what you do not think is credible.

You will consider who these witnesses are, their interest in the outcome, the influence they are under in testifying, whether their stories accord with documentary or physical

facts that are in evidence, and so you get the impression of what you believe of this evidence and what probably took place.

The reason what I am saying to you is important is because you are not dealing with certainties. You are dealing with probabilities; and what you deduce from the evidence as the probable fact in the relation of these parties and how those probabilities bear on the issues of fact that are given to you to determine, because there is here a burden of proof which the law requires of a complainant which in order that he may receive a favorable verdict at the hands of the triers of facts he must maintain by a certain weight, and that burden is that he must by this evidence convince your [fol. 441] minds by the greater degree of probability of his contentions than otherwise, that is, this burden requires him to make proof of the essentials of his claim by the greater weight of the probabilities as the jury deduces them from the evidence.

Now, the issues in this case are made up by pleadings, as they are called, papers filed in this Court. The one filed by the Plaintiff, as he is called, the one bringing the action, is a Petition; and the one filed by the sued, the Defendant, is called an Answer.

In substance this is the claim the Plaintiff makes: That the Defendant, Local No. 207 of the International Association of Bridge, Structural and Ornamental Ironworkers Union, is an unincorporated labor organization composed of a number of persons and a unit in an International organization;

That it acts through its officers and Executive Board and others;

That its membership is too numerous to mention; therefore, it is sued in the name of its officers;

That he for 13 years before the 13th of December, 1953, was a member in good standing of that organization and Local and that he was classified as a foreman and by many was employed as such, and that one of these was the William B. Pollock Company for whom he worked as foreman;

That the Defendant union, its officers and members, conspired to deprive him of his right to continue to work as a

[fol. 442] foreman for not only the William B. Pollock Company but for any other company in this jurisdiction of the Local; that in furtherance of this that Defendant notified his employer, the William B. Pollock Company, that Plaintiff's foreman's rights were suspended and demanded without cause that he be discharged from his employment;

That this company refused to do so and continued to employ him, the Plaintiff, as foreman until January 26, 1954; that the Defendants then in the furtherance of their conspiracy to deprive Plaintiff of his right to work as foreman or superintendent unlawfully instituted a strike by the members of the Defendant Local against the company on the job being performed at Hubbard, Ohio, for the purpose, the sole purpose of coercing the William B. Pollock Company to discharge the Plaintiff as a foreman;

That as a consequence of this he was discharged from his employment by the William B. Pollock Company on that date;

That the Defendant since the time of this discharge without justification prevented the Plaintiff from procuring employment as a foreman in ironwork by representing that he was suspended from the Union; that he, the Plaintiff, was at the time of filing this Petition 68 years of age; and that he has no other means of livelihood; that he had been earning previous to his discharge $15,000 a year and has not been able since to earn more than $1,000 per year;

[fol. 443] That he has been damaged for loss of earnings to date and will be continued to be damaged in the future, and he asks for a verdict as compensation.

In its Answer, the Defendant, in substance, says it admits that it is a Union, Local No. 207 of the International Association of Bridge, Structural and Ornamental Ironworkers; that it is an unincorporated labor organization; and denies each and every other allegation in the Petition complained of.

So the issue of fact is on the question of whether the allegation of the Petition that there was a conspiracy on the Part of the unincorporated labor union Defendant which was designed to affect his ability to secure employment and which caused damage by that end being served by the conspiracy.

Conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or some purpose not in itself unlawful by unlawful means. The essential element of a conspiracy is the common design and one is sufficiently shown if two or more persons in any manner tacitly come to an understanding that they will accomplish the unlawful design.

The kind of conspiracy that the Plaintiff here has to show by the greater weight of the evidence in order to recover is that there was a common purpose and a concert of acts by officers, agents or members of the Defendant Union with the intent in the minds of the different persons [fol. 444] to cause the Plaintiff to lose foreman's rights by refusal of members of the Union to take orders from him as foreman on any job, or by other means; that this design was carried out by authority, express or implied, or by tacit approval or ratification. If that purpose existed and was successful in causing such loss, and the Union officers and members who were participants or ratifiers knew the necessary consequence to the Plaintiff, then you would have a right to find that their purpose was to injure the Plaintiff.

If it is established by the greater weight of the evidence that a conspiracy existed and was carried on by officers and members or agents of the Union with its authority, express or implied, then the Union may be held as a co-conspirator, the same as in the similar situation a natural person would be.

Direct evidence is not necessary to prove a conspiracy. Circumstantial or indirect evidence is sufficient; or it may be proven by a combination of both direct and indirect evidence.

A labor union is an unincorporated association made up of all its individual members and as such may be responsible to third persons injured by its officers, agents and members who are acting within the scope of their authority for the union. A labor union is liable for any unlawful acts of its officers or members which it has either authorized or ratified and approved. A labor union is liable in damages for authorized or ratified acts of its officers and members.

[fol. 445] which acts result in preventing a former member from obtaining employment.

Ratification is the approval and adoption of the acts of another or others, that is, accepting it as done for the one ratifying it, that is, an assenting to it after it has been done and recognizing it as a valid act. It is of the essence of ratification that the principal confirms and adopts as his own an act done without his previous authority after he had full knowledge of the act.

So applying that law to what we have heard here, your question is: Has this evidence shown you that a conspiracy existed of the character claimed by the Plaintiff? Has it shown that by the greater weight of the evidence? Was it either by the authority, acts or ratification a conspiracy in which the Union was a participant or conspirator?

If you do not find that by the greater weight of the evidence, your verdict would be for the Defendant.

If you do find it, then because the claimed injury was loss of the right recognized by law of security of employment, if you find by the greater weight of the evidence that there was by reason of any such conspiracy such loss to the Plaintiff, he would as a matter of law be entitled to compensation.

Compensation means being made whole in the sum of money which you say in that event by the greater weight of the evidence is shown to have directly and naturally flowed from the injury.

[fol. 446] As I said a while ago, because I give you these rules of law as to nature of conspiracy, as to damage, it must not lead you to infer that you are required to find facts on which to apply this law. I give you the law. If you do not find facts to require its application, you simply do not use the law.

I have made this as simple as I can as to the nature of the action, as to the law applicable, and as to how your duties are to be performed. This is an extremely serious case to both parties. It strikes at important functions in our society. One is the place of the labor union in our society and economy. The other is the law which is applicable to all persons, natural or artificial, that one of the

fundamental rights is the right to employment and its security, unaffected by the doings of anyone else.

Those are important matters; both parties are interested in those matters. So that you are asked here to stay strictly within the issues of fact, to determine them from only what you have heard here, not to be influenced by any outside feeling as to who or what the parties are. Apply the law to this situation as if it were any other person involved. Let no outside feelings interfere with your common sense and intelligence in applying them to these issues.

I told you why we have a jury system. We have it in order that ordinary citizens with their human elements that make them up can consider these issues and determine them. [fol. 447] We being human and you being human, we necessarily have human feelings; we all come here into these positions either of judge or juror and we sometimes are unaware that feelings, our experiences, our background, do influence us, and we must be on our guard that they do not affect the job we have on hand which we must do within the limits the law requires of us.

Now, feelings are sometimes good in themselves. Sympathy, for instance, all of us humans ought to have it; and we all ought to feel sorry for another one of our number who has met with some misfortune or accident. But you must remember in this case that the Plaintiff is not here seeking your sympathy; and you have no right from sympathetic motives to affect the verdict you are asked to make. He is here making a demand. He is here making a legal claim. If he has substantiated it by the degree of proof required, then as a matter of law, not a matter of feeling, a matter of right, he is entitled to be compensated. It is just as simple as that. No feeling enters into it one way or the other.

Nor is he or this Union to be affected by another kind of feeling, not as nice as sympathy, which we designate as prejudice, which is a judgment that we render on things, persons, organizations, agencies, sometimes churches because of what they are, not what merits there might be but simply because we do not like them, do not like their looks, do not like what we have heard of them. That is

prejudice. That must not come in to affect either the rights [fol. 448] of the Plaintiff or the rights of this Defendant Union. Just take this issue, it is simple, the claim is simple, that there was a conspiracy affecting some vital right of the Plaintiff in which the Defendants engaged either by their full authority or by their ratification and which proximately resulted in financial injury to the Plaintiff; that is the issue. Has it been sustained by the greater weight of the probabilities from this evidence? It is an intellectual duty. Answer it "yes" or "no".

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[fol. 449] The Court: Well, I said to you, I think, that if [fol. 450] the Plaintiff is entitled to a verdict, he would be entitled to compensation, which is a word which means "being made whole" in such an amount in the form of dollars as you say will from this evidence make him whole for the damage done him by what in that event would be found by you to have been the injury inflicted on him from a financial standpoint.

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[fol. 451] COLLOQUY BETWEEN COURT AND JURY

The Court: I will excuse you all now, ladies and gentlemen. Do not discuss this in the meantime until 1:30 when you take up your work in your jury room.

Adjourn this Court until that time.

(Whereupon, the Court recessed 12:00 p.m., 12/1/60, and reopened at 3:40 p.m., 12/1/60, with the same appearances as hereinbefore mentioned.)

The Court: Ladies and gentlemen, you have sent in the following inquiry, "What was the statement that was made by Mr. Walsh when asked if he would hire Mr. Perko now, 1960?"

I will have the reporter read to you that testimony.

The Reporter: "Question: If Mr. Perko applied for work today and he was straightened out with the Union, would the company hire him today?

[fol. 452] "Answer: Well, I would—73, older today than

at that time. Yes. I'd still say probably a good man. I'd have to say that."

The Court: You may return to your jury room, ladies and gentlemen.

(Whereupon, the jury returned to the jury room at 3:42 p.m., 12/1/60; the Court again opening at 10:30 a.m., 12/2/60, with the same appearances as hereinbefore mentioned.)

The Court: Ladies and gentlemen, you have sent me a communication which I interpret to mean that you would like to have the testimony that is spoken of on this paper read to you.

"The testimony of Mr. Walsh concerning the Pollock Hubbard job."

The Reporter: "Question: Oh, yes, just one more thing, Mr. Walsh. In discussing this work stoppage that took place, actually, there were two jobs going, one in Hubbard and one at the Ohio Works; isn't that correct?

Answer: There may have been more than that; that is the two I know of right now.

Question: The one in Hubbard, was that one where the ironworkers just didn't show up for work or was it one where the company called the men off?

Answer: The company didn't call them off. They just [fol. 453] didn't show up or what, but they didn't work for about three days. That was all an iron worker job."

The Court: On this communication is this, "Testimony of Mr. Thomas concerning the Pollock Hubbard job."

The Reporter: Nothing.

The Court: The reporter says he finds nothing.

You may go back, ladies and gentlemen.

(Whereupon, the jury returned to the jury room at 10:22 a.m., 12/2/60; the Court again opening at 3:30 p.m., 12/2/60, with the same appearances as hereinbefore mentioned.)

The Court: Ladies and gentlemen, who is your foreman?

Juror No. 11: I am, sir.

The Court: First, I'd like to ask you your impression of whether with more deliberations you feel it reasonable

to say that you can arrive at some verdict by the concurrence of nine or more of your number?

The Foreman: When we were called back, Your Honor, when we—

The Court: Do not tell me how you stand.

[fol. 454] The Foreman: We were in the process of making a decision.

The Court: Were you?

The Foreman: Of one way or another about whether—

The Court: Well, you mean that you want time?

The Foreman: We would like another five minutes if we could have that. We will answer your question.

The Court: Gladly. You may go back.

(Whereupon, the jury retired to the jury room at 3:34 p.m., 12/2/60, and returned to the courtroom at 3:40 p.m., 12/2/60; the Court again opening with the same appearances as hereinbefore mentioned.)

The Court: Have you agreed on a verdict?

The Foreman: No, sir, Your Honor. The jury finds that they cannot reach a decision; and it is very apparent by the balloting that no decision can be reached.

The Court: Even with further deliberation?

The Foreman: That is why we went back again, Your [fol. 455] Honor. The jurors feel that their vote as it stands now is the way it will be.

The Court: If I give you another day, how many of you feel that if you had more time there would be a probability of some agreement? Do any of you feel that way?

(Some hands raised.)

The Court: Now, ladies and gentlemen, we have spent a week on this. It is a matter that if jurors are reasonable with each other, considering their respective views and considering the evidence, and if they use common sense, intelligence and have some intestinal fortitude, usually called courage or a smaller word than that, a common understanding or agreement can be reached. If I were to take you at your word now, it would mean that this matter will simply have to be tried again by a jury not any more intelligent than you look to me to be; and all this time will then have been in vain.

I would like to feel that if I gave you further time and with this little talk you might, if you tried again, arrive at some common decision of nine or more of your number.

Do any of you feel that if I gave you that time it would be of some value? Your foreman thinks so.

[fol. 456] (Some hands raised.)

The Court: All right. I think I will do it; because we are never going to get any more intelligent people than you, and we do not want to waste the public money in just voiding all the work of the week if we can with fairness and reason arrive at a verdict.

This case has been tried before and another jury did arrive at what you just told me about their inability to agree; but they took a day longer than you. So there is a precedent established in this case that seems to me that I ought to give you another day just as that other jury had. If the outcome is the same, well, all we will do is simply put another day's work in. That is all.

Now, there are enough of you that indicated that there was some chance of agreement if you took further time, and because of that I am going to give you another chance, a little longer time. I am not asking any of you to forego any conscientious opinion you have formed, not at all; I am only asking you to try again to see if you cannot come, with a little more time, to a common outcome, whatever that may be.

Now, I am asking you to make your choice of whether you would like to spend tomorrow or Monday. How many [fol. 457] of you would prefer to come Monday? Monday would be a whole day. Tomorrow would be a half day. How many would prefer to come Monday?

(Some hands raised.)

I suppose most of you do not want to come at all; but it is a choice of evils, ladies and gentlemen, as far as your time is concerned; and I would like you to say how many of you would say definitely that you prefer tomorrow?

(Majority of hands raised.)

The Court: Well, there seems to be a majority for tomorrow. Of course, that means that the judge and lawyers haven't any choice but to come too.

Well, I think, ladies and gentlemen, that that is what we will do, have another try at it. Overnight, get whatever guidance you can from a source of greater wisdom than we have, and use it in your deliberations tomorrow morning.

So I will excuse you now, asking you not to discuss this matter in any way outside of your jury room with anybody. Be here in the morning at 9:00 o'clock, to which time adjourn this court.

(Whereupon, the Court recessed at 3:50 p.m., 12/2/60.)

* * * * * * *

[fol. 458]

IN THE COURT OF COMMON PLEAS

Case No. 148440

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JACOB PERKO, Plaintiff,

vs.

LOCAL NO. 207, INT. ASS. OF B., S. & O. I. W. UNION, Defendant.

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JUDGMENT ON VERDICT

The jury in this case having returned a verdict for Plaintiff vs. Defendant Local No. 207, Int. Ass. of Bridge, Structural & Ornamental Iron Workers Union in the sum of $25,000.00:

It is therefore considered, adjudged and decreed by the Court that Plaintiff do recover from the Defendant Local No. 207, Int. Ass. of Bridge, Structural & Ornamental Iron Workers Union the said sum of $25,000.00, the amount of the verdict so returned together with his costs herein expended.

It is further considered, adjudged and decreed that Defendant Local No. 207, Int. Ass. of B., S. & O. I. W. Union pay the costs herein.

David G. Jenkins, Judge.

[fol. 459] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

Case No. 148440

[Title omitted]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—Filed December 12, 1960

Defendants respectfully move the Court to vacate the judgment entered herein on the 3rd day of December, 1960 in conformity to the verdict of the jury, and to render judgment in favor of this applicant, notwithstanding the verdict for the reason this applicant is entitled by law to judgment in its favor upon the evidence received on the trial.

Green, Schiavoni & Murphy, Attorneys for Defendants Union, 602 Stambaugh Building, Youngstown, Ohio.

Oral Argument Requested

Copy of the foregoing Motion for Judgment Notwithstanding Verdict mailed this 8th day of December, 1960 to Atty. Martin S. Goldberg, 20½ W. Boardman Street, Youngstown, Ohio, Attorney for Plaintiff.

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[fol. 460] [File endorsement omitted]

IN THE COURT OF COMMON PLEAS

[Title omitted]

MOTION FOR NEW TRIAL—Filed December 12, 1960

Defendant Union respectfully moves the Court for an Order granting a new trial for the following reasons:

1. The Judgment of the Court is not sustained by sufficient evidence;

2. The Judgment is contrary to law;

3. The damages awarded to Plaintiff are excessive and appear to have been given under the influence of passion or prejudice;

4. There were irregularities in the proceedings which prevented Defendant Union from having a fair trial;

5. Errors of law occurred at the trial which were duly accepted.

Green, Schiavoni & Murphy, Attorneys for Defendant Union, 602 Stambaugh Building, Youngstown, Ohio.

Oral Argument Requested

Copy of the foregoing Motion for New Trial mailed this 12th day of December, 1960 to Attorney Martin S. Goldberg, 201½ W. Boardman St., Youngstown, Ohio, Attorney for Plaintiff.

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[fol. 460a]

IN THE COURT OF COMMON PLEAS OF THE STATE OF OHIO
MAHONING COUNTY

May Term A.D. 1961

ORDERS DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING VERDICT AND FOR A NEW TRIAL—May 25, 1961

May 25, 1961 Hearing. Motion for judgment notwithstanding verdict overruled with exceptions. See J. (Jenkins) Journal 253 Page 311

May 25, 1961 Hearing. Motion for new trial overruled with exceptions. See J. (Jenkins) J. 253 P. 312

[fol. 461]

IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY
SEVENTH DISTRICT
Case No. 4193

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JACOB PERKO, Plaintiff-Appellee,

—vs—

LOCAL No. 207, et al., Defendants-Appellants.

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OPINION—March 6, 1962

Appearances.

McDonald, Hopkins, Hood & Hardy, Cleveland, Ohio, and Martin S. Goldberg, Youngstown, Ohio, for Plaintiff-Appellee.

Green, Schiavoni & Murphy, Youngstown, Ohio, for Defendants-Appellants.

Hon. Paul W. Brown, Hon. John L. Donahue, Hon. Lynn B. Griffith, JJ.

[fol. 462] DONAHUE, J.

This case comes before this court for the third time.

On the first occasion the Supreme Court in Perko v. Union, 168 Ohio St. 161, held that the petition stated a cause of action under the common law.

On the second occasion the Supreme Court in Perko v. Union, 171 Ohio St. 68, in a per curiam opinion, said that the common pleas court in granting judgment for defendant after a disagreement by the jury, had failed to explicitly find that there was no evidence to support a judgment for plaintiff and, therefore, could not enter judgment for defendant.

On this, the third occasion, we find a jury verdict for plaintiff.

The petition in this case alleges a conspiracy by the union and its members to keep plaintiff from working as a fore-

man or superintendent. When this cause arose, plaintiff had been a superintendent for The William B. Pollock Company in connection with blast furnace repair and construction. Difficulties between Ironworkers and Boilermakers were being ironed out, when plaintiff was accused, as an Ironworker, of aiding Boilermakers in learning Ironworkers' work, in contravention to the Ironworkers' rules and constitution.

[fol. 463] At a Union trial, he pled guilty and was fined. Said fine was later suspended by the International.

Following this trial, the small group of ironworkers on the job plaintiff was supervising, refused to take orders. No work stoppage occurred, since the orders were given by by-passing plaintiff and giving orders directly to foremen. Plaintiff continued on the job in other respects, was paid to the end of the job's contract. He suffered no financial loss because of the Ironworkers' conduct. In fact he continued to draw pay for some weeks after this contract's completion.

Evidence shows that when a contractor had a job contract, such as Pollock's had above, they could hire Ironworkers directly, or could call the Union who would furnish the necessary men. However, the contractor and the contractor alone had the privilege of picking the superintendents and foremen. The foremen generally had to have Union Books but superintendents did not. Under the union contract with the contractors, the union had no control over the picking or employment of foremen or superintendents. Therefore there could be no such thing as "foremen's rights" as such.

From the evidence, it appears that at no subsequent time did plaintiff, who was about 68 at that time, ever secure a job as foreman or superintendent. He in each of several subsequent years, did work, as an ironworker, but his [fol. 464] employment was always terminated before he earned $1,200.00 in any year. He was also on social security.

The evidence given by plaintiff indicates that he talked to a number of contractors, albeit somewhat vaguely, about his "foremen's rights". It would seem that he had a habit on these occasions of advising the contractor or superintendent that his "foremen's rights" had been suspended.

Only one representative of a contractor, Francis Walsh, of Pollocks indicated that he had ever contacted the Union with regard to these "foremen's rights". He testified that as the result of these contracts, he believed that he would run into troubles if he hired plaintiff.

This is the only testimony which supports plaintiff's claims in any respect.

Defendant is before us on twenty-three assignments of error. For their own convenience, counsel has argued them under five "arguments".

For our convenience we will consider the salient points raised.

Defendant maintains the acts alleged are protected under the National Labor Relations Act, Section 7. The question as to whether the petition in this case states a common law cause of action was disposed of, as we show above, in Perko v. Union, 168 Ohio St. 161. It is continually urged, however, that that phase of this case did not consider [fol. 465] the question of the protection afforded by Section 7.

It is true that Section 7 protects the men and union when they organize for, among other things, "other mutual aid or protection". But we see nothing in these words which allow them to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law action is not eliminated.

The second point raised is as to the sufficiency of the evidence to take the case to the jury. We agree that with all the testimony, there is very little that supports the cause sued on here. And yet we cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for plaintiff. Under the ruling in the second Perko v. Union appeal, 171 Ohio St. 68, to support a directed verdict, the trial court would have had to so find. We are bound by this case.

We find no other error or "argument" to be prejudicial to defendant.

Judgment affirmed.

Brown, P. J., Concurs. Griffith, J., Concurs.

[fol. 466]

IN THE COURT OF APPEALS OF OHIO

MAHONING COUNTY

SEVENTH DISTRICT

Case No. 4193

---

JACOB PERKO, Plaintiff-Appellee,

—vs—

LOCAL No. 207, et al., Defendants-Appellants.

---

JOURNAL ENTRY AFFIRMING JUDGMENT—
Filed March 13, 1962

1. On consideration of the record and assignments of error on this Appeal on questions of law, the Court fails to find any error appearing on the record in the judgment and proceedings of the Court below, prejudicial to the rights of appellants, and the judgment is therefore affirmed, at Appellants' costs, and it is ordered that a mandate issue to the Court below for enforcement of the judgment. The Court certifies, however, that there was reasonable grounds for this Appeal.

Paul W. Brown, Judge, John L. Donahue, Judge,
Lynn B. Griffith, Judge.

Approved by:

Martin S. Goldberg, Attorney for Plaintiff-Appellee.

Eugene Green, Attorney for Defendants-Appellants.

[fol. 467]

THE SUPREME COURT OF OHIO

JANUARY TERM, 1962

Case No. 37570

---

JACOB PERKO, Plaintiff-Appellee,

v.

LOCAL No. 207, et al., Defendants-Appellants.

---

Appeal from the Court of Appeals of Mahoning County.

Motion for an order directing the Court of Appeals for Mahoning County to Certify its Record.

McDonald, Hopkins, Hood & Hardy, Thomas D. McDonald, 1539 National City Bank Bldg., Cleveland, Ohio; Martin S. Goldberg, 20½ W. Boardman St., Youngstown, Ohio.

Green, Schiavoni & Murphy, 602 Stambaugh Bldg., Youngstown, Ohio.

---

MEMORANDA OF PLEADINGS, &C., FILED, WRITS ISSUED, &C., JUDGMENTS, ORDERS AND DECREES

| Date | |
|---|---|
| March 24, 1962 | Notice of Appeal and proof of service filed. |
| April 2, 1962 | Motion to Certify and proof of service filed. |
| April 10, 1962 | Leave granted to file transcript, original papers and bill of exceptions instanter. /s/ Carl V. Weygandt, Chief Justice. Journal 44, Page 631. |
| April 10, 1962 | Transcript of Docket and Journal Entries, original papers and bill of exceptions filed. |

| | |
|---|---|
| April 12, 1962 | Extension to May 1, 1962 for appellant's brief. /s/ Carl V. Weygandt, Chief Justice. Journal 44, Page 635. |
| May 4, 1962 | Leave granted to file appellant's brief instanter. /s/ Carl V. Weygandt, Chief Justice. Journal 44, Page 668. |

[fol. 468]

| | |
|---|---|
| May 4, 1962 | Assignments of Error, Appellant's non printed brief and proof of service filed. |
| May 17, 1962 | Extension to June 8, 1962 for appellee's brief. /s/ Carl V. Weygandt, Chief Justice. Journal 44, Page 686. |
| June 7, 1962 | Appellee's non printed brief and proof of service filed. |
| June 26, 1962 | Motion to dismiss appeal as of right filed. |
| July 5, 1962 | Motion for an order directing the Court of Appeals of Mahoning County to Certify its Record—Overruled. Journal 45, Page 66. |
| July 5, 1962 | Motion by Appellee to Dismiss Appeal as of Right Sustained. Journal 45, Page 66. |
| July 5, 1962 | Dismissed, No Debatable Constitutional Question Involved. Journal 45, Page 69. |
| July 12, 1962 | Certified copy of entry sent Clerk. |
| July 12, 1962 | Mandate issued Common Pleas Court. |
| August 10, 1962 | Notice of Appeal to United States Supreme Court and certificate of service filed. |
| August 13, 1962 | 1 additional copy of Notice of Appeal filed. |

[fol. 469]

JOURNAL ENTRIES

Journal 44, Page 631
Entry

Leave is hereby granted to file Court of Appeals Transcript, Original Papers and Bill of Exceptions instanter. /s/ Carl V. Weygandt, Chief Justice.

---

Journal 44, Page 635
Entry

On written request of counsel for appellants and for good cause shown, it is ordered that the time for filing appellants' brief in support of motion to certify record is extended to May 1, 1962. /s/ Carl V. Weygandt, Chief Justice.

---

Journal 44, Page 668
Entry

Leave is hereby granted to file brief of appellants instanter. /s/ Carl V. Weygandt, Chief Justice.

---

Journal 44, Page 686
Entry

On written request of counsel for appellee and for good cause shown it is ordered that the time for filing brief of appellee opposing motion to certify is extended to June 8, 1962. /s/ Carl V. Weygandt, Chief Justice.

---

Journal 45, Page 66
Motion for an Order Directing the Court of Appeals of Mahoning County to Certify Its Record.

It is ordered by the Court that this motion is overruled.

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Journal 45, Page 66
Motion by Appellee to Dismiss Appeal as of Right. Mahoning County.

It is ordered by the Court that this motion is sustained.

[fol. 470] Journal 45, Page 69

Appeal From the Court of Appeals for Mahoning County.

This cause, hereby on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendants-appellants his costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

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[fol. 471]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 17, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS, AND JAMES CASTNER,

*Petitioners,*

v.

JACOB PERKO

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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No.

---

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS, AND JAMES CASTNER,

*Petitioners.*

v.

JACOB PERKO

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

---

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on July 5, 1962.

## OPINIONS BELOW

The first opinion of the Supreme Court of Ohio, reversing a dismissal for lack of jurisdiction and remanding the case for trial, is reported at 168 Ohio St. 161, 151 N. E. 2d

742 (1958), and is also reproduced in Appendix A to this Petition.

The second opinion of the Supreme Court of Ohio, reversing a judgment for defendants and ordering a new trial, is reported at 171 Ohio St. 68, 167 N.E. 2d 903 (1960), and is reproduced in Appendix B to this Petition.

The opinion of the Court of Appeals of the Seventh Appellate District of Ohio, affirming the judgment for plaintiff entered after the second trial, is not yet officially reported. It is reproduced in Appendix C to this Petition.

The order of the Supreme Court of Ohio dismissing the defendants' appeal as of right for lack of a "debatable constitutional question" is not yet officially reported, but is reported unofficially at 184 N.E. 2d 100 (1962). It is reproduced in Appendix D to this Petition.

## JURISDICTION

The final judgment of the Supreme Court of Ohio was entered on July 5, 1962. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1257 (3).[1]

## QUESTIONS PRESENTED

Whether the National Labor Relations Act precludes a state court from exercising jurisdiction in an action for damages brought by a union member against his union claiming that the union wrongfully forced his employer to discharge him, and other employers not to hire him, because he had violated a union rule.

---

[1] The Supreme Court of Ohio's order dismissing petitioners' appeal as of right on the ground that "no debatable constitutional question exists herein" constitutes a final judgment of that Court which is reviewable by this Court on certiorari. *Tumey* v. *Ohio*, 273 U. S. 510, 515 (1927); Stern and Gressman, *Supreme Court Practice* 79 (2d Ed. 1954).

## STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Article 6, Clause 2 of the Constitution of the United States provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 2(3) of the National Labor Relations Act, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(3) (1958), states as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor. . . ."

Section 2(11) of the Act, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(11) (1958), states as follows:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 7 of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958), states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958), states in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; . . . Provided further, That no employer shall justify any discrimination against an em-

ployee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b) of the Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(b) (1958), states in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

Section 10(a) of the Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958), states as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. **Provided, That** the Board is empowered by agreement with any agency

of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

## STATEMENT

This case comes to this Court after having been through the courts of the State of Ohio three times. In order to understand the nature of the federal questions presented, and the manner in which they were raised below, it is necessary to review the somewhat long and tortuous history of this litigation.

### The First Round

On February 8, 1956, the plaintiff, Jacob Perko, filed a petition in the Court of Common Pleas of Mahoning County, Ohio, against Local 207 of the International Association of Bridge, Structural, and Ornamental Iron Workers (hereinafter referred to as the union) and certain of its individual officers, seeking damages under the state common law (R. 99).[2] The petition alleged that for many years the plaintiff had been a member in good standing of the union and had been employed as a "foreman" by the William B. Pollock Company, with whom the union bargained collectively. It further alleged that the defendants, "without justification," conspired to deprive the plaintiff of his right to con-

[2] The Record herein is paginated consecutively except for the transcript of testimony at the trial, which is paginated separately. We will therefore refer to the transcript of testimony as "Tr.", and to the rest of the Record as "R."

tinue to work for that company or "for any other company in the geographic jurisdiction of Local 207," and that, in furtherance of this conspiracy, the defendants first demanded that the Pollock Company discharge the plaintiff from employment, and subsequently "instituted a strike" against the company "for the sole purpose of coercing the William B. Pollock Company into discharging the plaintiff." As a result, according to the petition, plaintiff was discharged from his employment, and prevented from obtaining other employment as either a "foreman" or a "superintendent," all to his financial detriment.

On May 26, 1956, defendants filed an answer (R. 105), and on September 27, 1956, defendants filed a motion to dismiss the petition on the ground that the court lacked jurisdiction over the subject matter (R. 109). A memorandum which was attached as part of the motion asserted two grounds in its support: first, that the conduct alleged to have been engaged in by defendants would, if proved, constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board, and, second, that plaintiff has failed to exhaust the remedies available to him under the union's constitution and by-laws (R. 109). The court, after argument, dismissed the action on the second ground (R. 122), and the plaintiff appealed.

The Ohio Court of Appeals of the Seventh Appellate District affirmed the judgment without opinion (R. 127). The plaintiff then appealed to the Ohio Supreme Court, which reversed the judgment below and remanded the case for trial.

The Supreme Court wrote an opinion (Appendix A) which dealt with both of the defendants' arguments. It first disposed of the ground on which the trial court had relied—plaintiff's failure to exhaust internal union remedies—by holding that plaintiff was not seeking to redress any of his rights as a member of the union, but was seeking to remedy the alleged interference with his employment relationship, a

common law tort, to which no internal union remedies are applicable.

Turning then to the question of federal pre-emption, the court stated the following:

> "Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell*, 356 U. S. 634, 78 S.Ct. 932, 2 L.Ed. 2d 1030 and *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (Appendix A, p. 29-30)."

Accordingly, the case was remanded for trial.

**The Second Round**

On remand, the plaintiff amended his petition by increasing the prayer for damages (R. 133), and the defendants amended their answer by adding as an additional defense the allegation that the conduct alleged to have been engaged in by the defendants was a protected activity under Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958). (R. 136). The case was then tried to a jury. Defendants moved for a directed verdict at the close of plaintiff's case and at the close of the trial, but the court permitted the case to go to the jury. However, the jury was unable to reach a verdict and the court then

granted defendants' motion and directed a verdict in their favor (R. 145).

On appeal, this judgment was affirmed by the Court of Appeals without opinion (R. 150), and the plaintiff then appealed to the Supreme Court a second time.

The Supreme Court again reversed and remanded the case for a second trial. Stating that "the jurisdiction of the trial court to hear this action was determined by this court in its prior decision," the court dealt in depth only with the question of whether the trial court had applied the correct test in determining whether the evidence justified a directed verdict. Three of the judges noted their dissent, but wrote no dissenting opinion. (Appendix B.)

### The Third Round

On remand, the case was tried a second time. The evidence established that plaintiff was a member of the defendant union, which represents iron workers in the Youngstown, Ohio area (Tr. 105, 177). He had for many years been employed, either as a "foreman" or as a "superintendent" (Tr. 6), by the William B. Pollock Company, a construction company engaged in interstate commerce (Tr. 15-16).

A "superintendent" is the supervisor of an entire construction project, and under him will work a number of groups of employees, of various crafts, each represented by the appropriate craft union. One member of each such group is designated a "foreman," and has the job of transmitting to the members of his crew the instructions of the superintendent (Tr. 299). The foreman is always a member of the union (Tr. 179), and his wages, while somewhat higher than those of the other crew members, are established by the collective bargaining agreement between his union and the employer (Tr. 141).

Over a period of years, there had been a recurrent dispute between the iron workers and the boilermakers, each claiming the right to perform certain work (Tr. 18-21, 143-

44). As a result of this dispute, the defendant union had adopted a rule forbidding any iron worker "to go in as a boilermaker *or assist them in any way*" (Tr. 193, emphasis added).

In 1953 a dispute arose at a construction project being performed by the William B. Pollock Company, in which it was charged that boilermakers were performing work to which the iron workers were entitled. Plaintiff was employed as a superintendent on that project, and in that capacity he instructed boilermakers in the performance of the disputed work (Tr. 40-41).

Thereupon, on December 4, 1953, plaintiff was charged, within the union, with assisting boilermakers in violation of the union's rule (Tr. 58-59). He was tried, found guilty, fined, and suspended from membership pending payment of the fine (Tr. 58-59). The fine was later suspended by the parent International Union and plaintiff was placed on "probation", and permitted to resume payment of dues (Tr. 115-16).

The jurisdictional dispute eventually erupted into a work stoppage (Tr. 21-22), but shortly thereafter was resolved by an arbitration decision of a "labor management committee" established by agreement between the various building trades unions and the company, awarding some of the work to the iron workers and some to the boilermakers (Tr. 8-9).

According to testimony introduced by plaintiff, members of the defendant union, when they returned to work after the dispute was resolved, informed the Pollock Company that they would no longer take orders from plaintiff, because he had assisted boilermakers (Tr. 9, 14). Plaintiff remained in the company's employ for the remainder of that particular project, but he was never rehired by the company on any subsequent projects (Tr. 11-12).

Plaintiff testified that he attempted to obtain work as a superintendent or foreman several times after this incident, both with Pollock Company (Tr. 78) and with other com-

panies, but that he was unable to do so. He testified that companies would not hire him because of his "problem in the Union" (Tr. 92-94).

The defendants introduced evidence tending to show that the union had never interfered with plaintiff's attempts to obtain or keep employment as a supervisor or foreman;[3] and that, indeed, plaintiff had applied to only two companies for such work in the entire period after 1953: Pollock, and the American Bridge Division of United States Steel Corporation (Tr. 103). Defendants further introduced evidence that plaintiff, who had been 66 years of age when the dispute arose in 1954, had obtained several jobs as a journeyman with construction firms in subsequent years (Tr. 79), but that each year he had "retired" just before his earnings approached the level which would disqualify him for social security benefits (Tr. 98, 185-86, 394-95. See also Tr. 159, 292).

After all evidence and arguments had been presented, the trial judge instructed the jury. He first summarized the essential contentions of the plaintiff as follows:

> "That the Defendant union, its officers and members, conspired to deprive him of his right to continue to work as a foreman for not only the William B. Pollock Company but for any other company in this jurisdiction of the Local; that in furtherance of this that Defendant notified his employer, the William B. Pollock Company, that Plaintiff's foreman's rights had been suspended and demanded without cause that he be discharged from his employment;
>
> "That this company refused to do so and continued to employ him, the plaintiff, as foreman until January 26, 1954; that the Defendants then in the furtherance of their conspiracy to deprive Plaintiff of his right to

[3] Tr. 25-28, 59-61, 100, 152-54, 185, 209-11, 238-39, 253, 272, 283-84, 293, 298, 302-03, 315, 347, 357, 361-62, 365, 373-4, 386-90.

work as foreman or superintendent unlawfully instituted a strike by the members of the Defendant Local against the company on the job being performed at Hubbard, Ohio, for the sole purpose of coercing the William B. Pollock Company to discharge the Plaintiff as a foreman;

"That as a consequence of this he was discharged from his employment by the William *B. Pollock Company* on that date;

"That the Defendant since the time of this discharge without justification prevented plaintiff from procuring employment as a foreman in iron work by representing that he was suspended from the Union; that he, the Plaintiff, was at the time of filing this Petition 68 years of age, and that he had no other means of livelihood; that he had been earning previous to his discharge $15,000 a year and has not been able since to earn more than $1,000 per year . . ." (Tr. 441-442).

The Judge then proceeded to instruct the jury as to the applicable common law, stating, in effect, that if the plaintiff had proved the above contentions by a preponderance of the evidence then he would be entitled to recover damages (Tr. 445).

The Court refused to give the following instruction, requested by the defendants:

"I charge you that it is established law that employees have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid or protection.

"If you find by a preponderance of the evidence that the steward at the Ohio Works job and the other members of the Union refused to take orders from the Plaintiff solely for their mutual aid or protection, then you may not consider this conduct as evidence of a con-

spiracy since such acts are legally protected, and you must find for the Defendant" (Tr. 437).

After extended deliberations which almost ended in another hung jury (Tr. 454-57), the jury reported a verdict for the plaintiff in the amount of $25,000 (R. 155). The court entered judgment accordingly (R. 156), and denied defendants' motion for a Judgment N.O.V. and for a new trial (R. 157, 158).

The Defendants then appealed to the Court of Appeals, raising, *inter alia,* the argument that the decision of this Court in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), which was rendered after the first decision of the Supreme Court of Ohio in the present case, made clear that "whether the conduct [of the union] is permitted by Section 7 or condemned by Section 8 is for the [National Labor Relations] Board and not a Court to decide" (R. 227). Plaintiff, however, argued that *Garmon* in no way affected the correctness of the original decision of the Supreme Court of Ohio (R. 257-260).

The Court affirmed the judgment below, stating with respect to the pre-emption issue only that Section 7 of the National Labor Relations Act does not permit defendants "to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law Action is not eliminated" (Appendix C).

Defendants then appealed to the Supreme Court of Ohio, both by motion for an order directing the Court of Appeals to certify its record, and by invoking the right to appeal as to constitutional questions. The Court, without opinion, denied the motion to certify the record (R. 5), and dismissed the appeal on the ground "that no debatable constitutional question exists herein" (R. 6; Appendix D), notwithstanding the fact that both parties, in their briefs, presented arguments as to whether, in the light of *Garmon,* the original de-

cision of the Supreme Court of Ohio was correct (R. 25-28, 56-61).

Having thus exhausted the available state remedies, defendants now petition this Court for certiorari.

## REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Ohio in this case is in direct conflict with the decision of this Court in the second *Garmon* decision: *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).[4] In that case, this Court held that a state court is precluded from exercising jurisdiction in an action for damages "when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." 359 U. S. at 244. The opinion proceeded to explain how this principle is to be applied:

> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a

[4] The first *Garmon* decision, *San Diego Building Trades Council* v. *Garmon*, 353 U. S. 26 (1957), reversed a state court injunction and judgment for damages which were based on a finding that the union had engaged in an unfair labor practice, and which were rendered after the NLRB had refused to take jurisdiction of the case. But the Court remanded the case because the original state decision seemed to be based on federal law, and there had thus been no determination by the state court as to whether the damages might have been sustained under the law of the state. This Court, of course, was unable to reach the question whether an action for damages under state law was preempted until the antecedent state-law question was decided by the state courts.

State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, *e.g.*, *Garner* v. *Teamsters Union*, 346 U. S. 485, especially at 489-91; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

". . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

". . . It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." 359 U. S. at 244-46.

The two cases relied on by the Ohio Supreme Court in its first decision in this case, *International Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (1958) and *United Automobile Workers* v. *Russell*, 356 U. S. 634 (1958), were specifically distinguished in *Garmon* as representing two narrow exceptions to the general rule. The state court was permitted to exercise jurisdiction in *Russell*, said the Court, even though the conduct involved was also an unfair labor practice, because there was involved "violence and imminent threats to the public order," and in that situation the principle of federal pre-emption must yield to the paramount state interest in maintaining the peace. 359 U. S. at 247-48. And the state court was permitted to exercise jurisdiction in *Gonzales*, even though no violence was involved, because "the activity regulated was a merely peripheral concern of the Labor

Management Relations Act." Id. at 243. This statement referred to the fact that in *Gonzales* the action was for wrongful expulsion from union membership—a matter not directly dealt with in the Act—and the only possible conflict with the jurisdiction of the NLRB resulted from the fact that part of the relief granted by the state court was damages to compensate the plaintiff for the loss of his job, which was found to be a consequence of his expulsion from the union, but which was probably also the result of an unfair labor practice.

Neither of these two narrow exceptions to the basic holding of *Garmon* is applicable here. The wrong which the plaintiff in this case sought to remedy was the alleged action of the union and its agents of inducing his employer to discharge him, and other employers not to hire him. He did not allege any violence, nor did he allege that the union wrongfully expelled him from membership or disciplined him as a member. Indeed the first opinion of the Ohio Supreme Court expressly stated that plaintiff was "not attempting to secure any redress for loss of rights as a member of the union" (App. A, p. 29). And the trial judge specifically charged the jury that "the trial of Jacob Perko by the Executive Board of the Defendant Union . . . was an exercise of a lawful right . . .", and that "the findings and penalty of the Local Union as modified by the International Union cannot be questioned in this court in this proceeding" (Tr. 424).

It follows that neither *Russell* nor *Gonzales*, when read in the light of *Garmon*, sustain the jurisdiction of the state court in this case. Rather that jurisdiction could be sustained only if it were clearly established, by an NLRB determination or by "compelling precedent applied to essentially undisputed facts," that the alleged activities of the union which are the subject of this action are neither prohibited by Section 8 nor protected by Section 7 of the National Labor Relations Act.

The Court below did not even purport to so hold. Rather, the first decision of the Supreme Court of Ohio, which established the law of the case as to jurisdiction, seemed to assume that the union *had* committed an unfair labor practice:

> "The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, *which is also an unfair labor practice proscribed by the act,* as to preclude an appropriate state court from exercising jurisdiction." (Emphasis added).

This holding is flatly contrary to *Garmon.* It was made, of course, prior to *Garmon.* At that time, the notion that actions for damages under state tort law were not preempted, even when the complaint alleged conduct which is (or may be) also an unfair labor practice, had some currency. See, *e.g., Selles* v. *Local 174, International Brotherhood of Teamsters,* 50 Wash. 2d 660, 314 P. 2d 456 (1957), *cert. denied,* 356 U. S. 975 (1958); *International Sound Technicians* v. *Superior Court,* 141 Cal. App. 2d 23, 296 P. 2d 395 (1956). See also 71 Harv. L. Rev. 742 (1958). The first *Garmon* decision of this Court, 353 U. S. 26 (1957), in which the damages issue was remanded to the state court (see note 4, *supra*), tended to give some support to that notion, as did the decisions in *Russell* and *Gonzales,* upon which the Ohio Court relied.

But the second *Garmon* decision was decided prior to the third round of appeals in this case, and was specifically brought to the attention of both the Ohio Court of Appeals and the Ohio Supreme Court by the defendants' counsel. Nevertheless, those courts refused to reconsider the original holding of the Ohio Supreme Court. Thus, unless this Court grants certiorari in this case, the Ohio courts will presumably continue to entertain all damage actions arising out of conduct which is or may be an unfair labor practice.

Moreover, the court below not only applied the wrong standard in determining whether it had jurisdiction in this case, but it reached the wrong result. The conduct which the union allegedly engaged in, and which was the only basis for plaintiff's common law claim, is not only arguably, but probably, an unfair labor practice. The case should therefore have been dismissed for lack of jurisdiction.

The substance of the plaintiff's claim in this case was that, because he violated a union rule, the union, by strike, threats to strike, and other means forced the plaintiff's employer to discharge him from his job as "superintendent" and forced other employers not to hire him, either as a "superintendent" or as a "foreman." If a charge to that effect were proved before the NLRB, it is likely that the union would be found in violation of Section 8(b)(2) and/or Section 8(b)(1)(B) of the Act. 29 U.S.C. §§ 158(b)(2), 158(b)(1)(B).

Section 8(b)(2) provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—
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> * * *
>
> "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)[8] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

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[8] Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958), states as follows:

> "It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization. . . ."

This Court, in *Radio Officers* v. *NLRB,* 347 U. S. 17, 40 (1954), held that "§§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood." On that basis, the Court found a violation of 8(b)(2) where the union induced an employer to deny employment to a union member who had disobeyed a union rule, even though he had not actually lost his union membership, since the purpose of such discrimination was "to encourage members to perform obligations or supposed obligations of membership." *Id.* at 52.

In the light of that decision, the facts alleged by the plaintiff in the present case would be not only arguably but probably a violation of 8(b)(2). The only possible argument to the contrary would be that Section 8(b)(2) is not applicable to this case because both "foremen" and "superintendents" are "supervisors" under the Act, and not "employees" within the meaning of Section 8(b)(2).

From the evidence in the record, however, it appears probable that a "foreman," as that term is used in this case, is an employee within the meaning of the Act. He is covered by the collective agreement (Tr. 141), he is required to be a member of the union (Tr. 52), generally he is chosen at the job site from among the members of the crew (Tr. 362), he may work at the trade along with his crew (Tr. 213, 247), and his supervisory duties are limited to passing along the instructions of the superintendent (Tr. 358). In short, he seems to be what is generally called a group leader or a strawboss—two witnesses used the term "pusher" (Tr. 212, 299)—whose supervisory duties are "merely routine" and do not "require the use of independent judgment," and who is therefore an "employee" rather than a "supervisor" under the Act. §§ 2(3), 2(11), 29 U.S.C., §§ 152(3), 152(11). See, e.g., *International Bh'd of Boilermakers,* 119 NLRB

1605 (1958), *enforced*, 259 F. 2d 957 (D.C. Cir. 1958); *New York Shipping Ass'n*, 116 NLRB 1183 (1956).[6]

But even if "foremen" as well as "superintendents" were deemed to be supervisors, the probability that the union's alleged conduct would be an unfair labor practice would be just as strong—the only difference being that the applicable Section of the Act would be 8(b)(1)(B), rather than 8(b)(2). Section 8(b)(1)(B) reads as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents
>
> "(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;"

The purpose of this provision, as stated by Senator Taft, was to prevent a union from "saying to the employer, 'you have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'" 2 *Leg. Hist. of Labor-Management Relations Act* 1012. See also *Id.* at 1077. The Senator could not have more precisely stated the plaintiff's allegation in the present case.

Section 8(b)(1)(B) was designed to make supervisors answerable solely to the employer, and to free them from possible restraints from the union. Thus, it has been held

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[6] In the latter case, the Board stated:

> "The Board has had frequent occasion to distinguish between strawbosses or group leaders on the one hand and supervisors on the other, and has found that the fact that strawbosses or group leaders are more experienced, receive slightly higher pay, and transmit routine instructions does not convert their status from employees to supervisor. The testimony in the record, in our opinion, establishes that not only have the hatch bosses never been considered representatives of management, but that, in a real sense, they are more akin to gang representatives. We find, moreover, that whatever direction they give to the men in their gangs is of a routine nature which does not require any appreciable independent judgment, and that they serve as a conduit in the transmission of directions." 116 NLRB at 1187.

to be an unfair labor practice for a union to demand that all supervisors must be union members, even when the union guarantees that it "shall not discipline the foreman for carrying out written instructions of the publisher [employer]." *International Typographical Union*, 123 NLRB 806 (1959), *enforced*, 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided court*, 365 U. S. 705 (1961). *A fortiori* it must follow that the union violates Section 8(b)(1)(B) when it does, in fact, demand the firing of a supervisor,[7] as is alleged in this case, because he obeys the employer rather than his union's rules. *Cf. Radio Officers* v. *NLRB, supra.*

The above discussion, while by no means exhaustive of the subject, should be sufficient to show that the conduct alleged to have been engaged in by the defendants would, if proved, probably constitute an unfair labor practice.[8] It follows that the decision of the Ohio Supreme Court in this case, both in its holding and in its result, was directly contrary to *Garmon.*

We have stressed, throughout the above discussion, that the union's *alleged* conduct, *if proved*, would probably have been an unfair labor practice. We recognize, of course, that

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[7] As the First Circuit noted, supervisors' duties "necessarily" include "participation in the adjustment of grievances" within the meaning of Section 8(b)(1)(B), *International Typographical Union* v. *NLRB*, 278 F. 2d, at 12. See also remarks of Senator Taft, *supra.*

[8] After the Ohio Supreme Court refused to sustain the dismissal of this action on the ground that the alleged conduct of the union was probably an unfair labor practice, the answer was amended to raise the additional defense that the union's conduct was protected under Section 7 (R. 136). This was, of course, the only remaining pre-emption argument which was not foreclosed by the Ohio Supreme Court's first decision. In the light of what we have stated in this petition, the alleged activity of the union, if proved, would probably be prohibited by the Act rather than protected. However, if we are in error in our argument, it would then be strongly arguable that the union's conduct, being for the "mutual aid and protection" of its members and entirely peaceful, would be protected under Section 7. Under *Garmon*, the possibility of this result is also sufficient to preclude state court jurisdiction.

this Court must assume that the plaintiff's allegations were proved, since this is not the appropriate forum in which to review the sufficiency of the evidence.

Nevertheless, it is significant that the factual issues were hotly contested in this case, and that the Ohio courts had great difficulty resolving them. Thus, the jury at the first trial was unable to agree on a verdict, and the trial judge then directed a verdict for defendants which was affirmed by the Ohio Court of Appeals (R. 150). The Ohio Supreme Court reversed, not because it believed that the evidence was sufficient to preclude a directed verdict, but only because it felt that the trial judge had applied the wrong test in weighing the sufficiency of the evidence (Appendix B). At the second trial, the jury almost failed to reach a verdict again (Tr. 454-57), and the Court of Appeals affirmed the verdict finally reached only with obvious reluctance:

> "We agree that with all the testimony, there is very little that supports the cause sued on here. And yet we cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for the plaintiff. Under the ruling in the second *Perko* v. *Union* appeal, 171 Ohio St. 68, to support a directed verdict, the trial court would have had to so find. We are bound by this case" (R. 46; App. C., p. 38).

The closeness of the factual issues in this case dramatizes the importance of having them determined by the expert National Labor Relations Board, rather than by a lay jury. As this Court has stated:

> "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *NLRB*, 324 U. S.

793, 800 (1945). See also *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

2. The above discussion demonstrates, we believe, that the decision of the Ohio Supreme Court, both in its holding and in its result, directly conflicts with this Court's decision in *Garmon*. This, in itself, is sufficient reason for this Court to grant certiorari and reverse the decision summarily. *Cf. DeVries* v. *Baumgartner's Elec. Const. Co.*, 359 U. S. 498 (1959); *Local Union 429, IBEW* v. *Farnsworth & Chambers Co.*, 353 U. S. 969 (1957); *Teamsters* v. *Kerrigan Iron Works, Inc.*, 353 U. S. 968 (1957).

But there is yet another reason why this case merits the attention of this Court. The basic error committed by the Ohio courts in this case was to misconstrue the decisions of this Court in *Russell* and *Gonzales* as broadly authorizing state courts to assume jurisdiction in any tort action for damages, even though the alleged wrong might also constitute an unfair labor practice. As we pointed out above, this Court made clear in *Garmon* that the state court had been permitted to act in *Russell* only because of the presence of violence in that case, and that the state court had been permitted to act in *Gonzales* only because that case involved a matter of "merely peripheral concern" under the federal Act—wrongful expulsion from union membership. Yet the court in the present case refused to reconsider its original decision even when the *Garmon* decision was specifically brought to its attention.

The Ohio court's apparent failure to comprehend the distinction between *Russell* and *Gonzales* on the one hand, and *Garmon* on the other, is not unique. Several other state court decisions, subsequent to *Garmon*, have manifested a similar lack of understanding of these distinctions.

One such case is *Taylor* v. *Hoisting Engineers Local 101*, 189 Kan. 137, 368 P. 2d 8 (1962). The essence of the complaint in that case was that the union "did willfully, inten-

tionally, and oppressively refuse to permit plaintiff to join said union, and did willfully, intentionally, and oppressively cause plaintiff to be discharged from his said employment because plaintiff was not a member of said union . . ." 368 P. 2d at 10. The National Labor Relations Act, on its face, makes it an unfair labor practice for an employer to discharge an employee who is not a union member, even where there is a valid agreement requiring membership as a condition of employment, if membership was denied the employee for any reason other than for failure to tender dues. § 8(a)(3), 29 U.S.C. § 158(a)(3). Accordingly, it is a violation of 8(b)(2) for a union to cause an employer to discharge an employee in those circumstances. The complaint in the *Taylor* case, therefore, plainly charged the union with an unfair labor practice.

The Supreme Court of Kansas nevertheless refused to dismiss the action for lack of jurisdiction. Although it seemed to rely in part on the "right to work" provision of the state constitution, and on the special status afforded "right to work" laws under Section 14 (b), 29 U.S.C. § 164(b), the court's principal holding appears to be that "plaintiff may still place his right to sue upon the common law of the state." 368 P. 2d at 10. After discussing both *Gonzales* and *Garmon*, the court concluded that the case before it was like *Gonzales*, and that *Garmon* "does not control the instant case." *Id.* at 11. The Court specifically relied on *Selles* v. *Local 174, International Brotherhood of Teamsters*, 50 Wash. 2d 660, 314 P. 2d 456 (1957), which was one of the pre-*Garmon* cases holding broadly that damage actions are not pre-empted.

A similar case is *Willard* v. *Huffman*, 250 N.C. 396, 109 S.E. 2d 233 *cert. denied*, 361 U. S. 893 (1959), in which the claim was that plaintiff had been discharged for refusing to join a union, in violation of the state "right-to-work" law. Here also the decision of the court that it had jurisdiction

was based in part on Section 14(b),[9] but the Court in its opinion did not rely wholly on that ground. As an additional basis for its decision, it stated:

> "In view of what was said in . . . Gonzales . . . . and Russell, supra, relative to the right to recover damages for tortious conduct, irrespective of whether or not such conduct was an unfair labor practice, in our opinion the judgment of the court below should be upheld, and we so hold." 109 S.E. 2d at 243.

This decision was followed in *Keller* v. *Huffman Full Fashioned Mills,* 251 N.C. 92, 110 S.E. 2d 480 (1959).

Another state court case which showed a lack of understanding of the distinction between *Garmon* and *Gonzales* is *Lockridge* v. *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees,* 369 P. 2d 1006 (Ida. 1962). That was a case like *Gonzales,* and the Court reached what appears to be the correct result that the state court had jurisdiction. But the Court was unable to articulate the distinction between *Gonzales* and *Garmon,* and it finally decided in favor of state jurisdiction on this basis:

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[9] The reliance of the courts in *Willard* and *Taylor* on Section 14(b) appears to be misplaced. Section 14(b) provides that nothing in the Act

> "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The purpose of this provision was to permit states to prohibit what the Act itself permits—the execution and enforcement of collective agreements requiring union membership as a condition of employment. It was not intended to permit states to prohibit what the act itself prohibits—discrimination against nonmembers in the absence of a valid agreement requiring membership as a condition of employment. Since both *Willard* and *Taylor* involved conduct which was probably an unfair labor practice under the Act, Section 14(b) did not give the courts jurisdiction in those cases. See *Local Union 429, IBEW* v. *Farnsworth & Chambers Co.,* 353 U. S. 969 (1957), *reversing* 201 Tenn. 329, 299 S.W. 2d 8; *DeVries* v. *Baumgartner's Elec. Constr. Co.,* 359 U. S. 498 (1959), *reversing* 77 S.D. 273, 91 N.W. 2d 663.

> "In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' nor 'pre-empted' by federal law, or, more appropriately, the National Labor Relations Board," 369 P. 2d at 1010.

The Pennsylvania Supreme Court, on the other hand, seems to have taken the view that *Garmon* has virtually overruled *Gonzales* as to the right to recover damages for loss of employment even when the action is based on the allegation of unlawful expulsion from union membership. Thus, in *Wax* v. *International Mailers Union,* 400 Pa. 180, 161 A. 2d 603 (1960), the court refused to entertain jurisdiction in a case of that kind, relying partly on its view that the case before it was distinguishable from *Gonzales,* but partly also on its view that "the Gonzales decision has been almost entirely obliterated by the subsequent holding in the second Garmon case," 161 A. 2d at 608. See also *Baker* v. *Shopmen's Local No. 755,* 403 Pa. 31, 168 A. 2d 340 (1961).

A number of state courts, of course, have articulated the rule which appears to be the correct one: an employee may bring an action against his union under state law for wrongful expulsion from membership, and may recover, as an element of damages, compensation for the loss of his job if that was a consequence of the wrongful expulsion. He may not, however, sue the union where the crux of the action is that the union wrongfully obtained his discharge, since his exclusive remedy for unlawful interference by the union with his employment relationship—as distinguished from wrongful expulsion from membership—is under the National Labor Relations Act. *E.g., Fullerton* v. *International Sound Technicians,* 194 Cal. App. 2d 805 (1961); *Green* v. *Folks,* 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961).

This case is an unusually good vehicle for re-emphasizing the distinction between *Russell* and *Gonzales* on the one

hand and *Garmon* on the other. This case, unlike *Russell,* involved no violence. And, unlike *Gonzales,* the claim asserted by the plaintiff here was not for improper expulsion or discipline, but for tortious interference with the employment relationship. Both the first decision of the Supreme Court of Ohio and the trial judge's charge to the jury make that absolutely clear. (See Appendix A at p. 29; Tr. 424.) Thus, by granting review in this case, the Court would be able to clarify one of the few remaining areas in the law of federal pre-emption under the National Labor Relations Act which appears still to be confusiong to the state courts.

## CONCLUSION

For the reasons stated, petitioners pray that this petition for certiorari be granted.

Respectfully submitted,

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## *Appendix A*

### First Round—Opinion of the Supreme Court of Ohio, July 2, 1958

[CAPTION OMITTED]

The appellant, Perko, brought two actions in the Court of Common Pleas to recover money damages for alleged wrongful interference with his right to work. In one action, Local No. 207 of International Association of Bridge, Structural and Ornamental Iron Workers Union, an unincorporated labor organization of which he was a member, and five individuals, officials of the union, were named defendants. In the other action, the same five named individuals were made defendants, but the union was not.

The material allegations of the petitions in the two actions are practically the same. Plaintiff alleges that for several years he was a member of the defendant union, classified as a foreman and employed as such by the William B. Pollock Company; that defendants, without justification, conspired to deprive plaintiff of his right to continue to work as foreman for the William B. Pollock Company and as foreman for any other company in the geographic jurisdiction of Local No. 207, by suspending his foreman's rights, by demanding that the Pollock company discharge plaintiff as superintendent and foreman and by instituting a strike against the Pollock company for the sole purpose of coercing the company to discharge him; that in consequence thereof plaintiff was discharged; and that defendants have prevented plaintiff from procuring employment as a foreman. The prayers are for money judgments for loss of earnings against defendants and each of them.

In each case the defendants filed a motion to dismiss the petition for the reason that the court does not have jurisdiction over the subject matter of the cause of action.

Without hearing any evidence, the trial court in each case sustained the motion and dismissed the petition.

The Court of Appeals affirmed the judgments.

The causes are in this Court for review, a motion to certify the record in each case having been allowed.

PER CURIAM:

Defendants contend that the petitions do not state a cause of action at common law; that there is presented an instance of a union member seeking a monetary award from the union to which he belongs and from its duly elected representatives, without alleging that he has exhausted the remedies provided by the constitution and bylaws of the union; and that a state court has no jurisdiction to award a judgment against a union or its representatives for money damages resulting from loss of employment caused by union activity proscribed as an unfair labor practice by the National Labor Relations Act, 29 U.S.C.A. § 151 et seq.

Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. He is not seeking reinstatement. He is not asking for equitable relief. He is alleging that the union to which he belonged and certain named officials thereof committed a common-law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment with the William B. Pollock Company, for which he asks money judgments.

To require the plaintiff to first exhaust his remedies provided by the constitution and bylaws of the defendant union, as contended by defendants, by appealing to the union, the one alleged to have committed the tort, to determine a monetary award for such tort, would be requiring a vain thing, especially since it has not been pleaded or established that the union has internal remedies available to plaintiff.

Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the

subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell*, 356 U. S. 634, 78 S.Ct. 932, 2 L. Ed. 2d 1030, and *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018.

The trial court was in error in dismissing the petitions for want of jurisdiction.

Judgments reversed and causes remanded.

WEYGANDT, C. J., ZIMMERMAN, STEWART, TAFT, MATTHIAS, BELL, and HERBERT, JJ., concur.

## *Appendix B*

**Second Round—Decision of the Supreme Court of Ohio, June 1, 1960**

[CAPTION OMITTED]

This same cause was here before as reported in 168 Ohio St. 161, 151 N.E. 2d 742. At that time the Court of Appeals had affirmed the judgment of the Court of Common Pleas, which sustained the motion to dismiss the petition on the ground that the trial court did not have jurisdiction of the subject matter of the cause of action. The judgment was reversed and the cause remanded for further proceedings.

Accordingly, it was tried on the original petition amended by leave of court so as to increase the amount of damages prayed for. An amended answer in the nature of a general denial was filed by the defendants. A jury was impaneled, and the presentation of testimony consumed four days. At the end of plaintiff's case, defendant union moved for a directed verdict in its favor on the ground "that there is no evidence to support the allegations in plaintiff's petition and that the acts committed by the defendant union are protected activities within the meaning of Section 7 of the National Labor Relations Act," which motion was overruled by the court. The motion for a directed verdict for the same reasons was renewed at the end of all the testimony and again overruled by the court. The cause was then submitted to the jury which deliberated for two and one-half days without arriving at a verdict. After reporting to the court that its members were unable to reach a decision on the verdict, the jury was discharged on October 21, 1958, the entry being journalized the following day. Prior to that the jury was twice told by the court, during its deliberations and upon inquiry by it, that if it could not agree the case would have to be retried by another jury.

On October 23, 1958, a motion, captioned "Motion for Judgment on Disagreement of Jury" was filed reading, "Defendant respectfully moves the court for judgment in its

favor, for the reason it is entitled by law to judgment upon the evidence received on the trial of this action, although the jury failed to reach a verdict and was discharged."

On January 28, 1959, the trial court sustained the motion and rendered judgment in favor of defendants. No opinion was rendered by the trial court setting forth the basis on which the motion was sustained and judgment entered for defendants. An appeal was prosecuted by plaintiff to the Court of Appeals, which court affirmed the judgment of the Court of Common Pleas, stating in its entry:

> "The court after careful consideration of the entire record finds that the plaintiff, appellant has not sustained the burden of proof resting upon him in support of the allegations contained in his petition and that the judgment of the trial court in sustaining the motion of the defendant, appellee for judgment on the evidence notwithstanding the failure of the jury to agree upon a verdict should be and the same is hereby affirmed."

The cause is before this Court upon the allowance of a motion to certify the record.

PER CURIAM:

Section 2323.18, Revised Code, provides, in part, as follows:

> "When upon the statements in the pleadings or upon the evidence received upon the trial, or both, one party is entitled by law to judgment in his favor, upon motion of such party, filed as provided in Section 2323.181 of the Revised Code, judgment shall be so rendered by the court although the jury may have failed to reach a verdict or a verdict has been rendered against such party and a judgment entered thereon, and whether or not a motion to direct a verdict has been made or overruled, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

The motion for judgment in the Court of Common Pleas was sustained upon the claim that the defendant "is entitled by law to judgment upon the evidence received on the trial" and the affirmance by the Court of Appeals was based on the finding that the plaintiff "has not sustained the burden of proof resting upon him in support of the allegations contained in his petition."

The finding of the trial court that the defendant "is entitled by law to judgment upon the evidence received on the trial" was not a finding that there was no evidence to support a judgment for the plaintiff. If the judgment was so intended the trial court could have made that finding. It should be noted that defendants' request for judgment at the end of plaintiff's evidence was overruled and, when renewed at the end of all the testimony, was again overruled. The jurisdiction of the trial court to hear this action was determined by this court in its prior decision, supra. See, also, *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, 2 L. Ed. 2d 1018, 78 S. Ct. 923, and *International Union* v. *Russell,* 356 U. S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932. This leaves us, therefore, only the question of evidence.

Obviously, the trial court was not of the opinion that there was no evidence to support the plaintiff's cause or it would have so ruled at the end of all the testimony, if not at the end of plaintiff's testimony. The only construction remaining to be resolved so far as the trial court's decision is concerned relates to the burden of proof and the affirmance of the trial court's judgment by the Court of Appeals on the ground that plaintiff had "not sustained the burden of proof resting upon him." That appellate court finding recognizes that the finding of the trial court was reached by weighing the evidence. The affirmance was without an accompanying opinion explaining or setting forth how defendant "was entitled by law to judgment in his favor."

Had the jury arrived at a verdict for either plaintiff or defendants the trial court would have been without authority

under Section 2323.18, Revised Code, quoted supra, to have rendered judgment for the adverse party on the basis of weight of the evidence. Upon such a finding, the trial court would have been required to grant a new trial. Had a verdict been found for either party and judgment entered accordingly, the Court of Appeals would have been without authority on appeal to enter final judgment for the adverse party or modify the trial court judgment (except as to remittitur) on the weight of the evidence.

The burden which rested upon the plaintiff in this case was to establish the material averments of his cause of action by a preponderance of all the evidence. *Ginn, Admr.* v. *Dolan,* 81 Ohio St. 121, 90 N.E. 141, 135 Am. St. Rep. 761; *Klunk* v. *Hocking Valley Ry. Co.,* 74 Ohio St. 125, 77 N.E. 752; 21 Ohio Jurisprudence 2d. 161 et seq., Section 154; *Brunny, Admx.* v. *Prudential Ins. Co.,* 151 Ohio St. 86, 93, 84 N.E. 2d 504.

The fact that no verdict was rendered by the jury because of its failure to agree does not deprive the parties of their respective rights to try the case again. The trial court could have entered its judgment only after finding that at the conclusion of all the testimony and after construing all the relevant and competent evidence adduced most strongly in the plaintiff's favor, it was in law not sufficient to warrant the relief prayed for in the petition of the plaintiff.

In the case of *Dick* v. *Railroad Co.,* 38 Ohio St. 289, at page 392, it is stated in the opinion:

> "If there was evidence tending to support the issue, the court below erred in arresting it from the jury. It is only, where no evidence is introduced by the plaintiff, tending to support the issue, or where it is such as to show clearly, that he has no cause of action, that it is the duty of the court, to direct judgment of nonsuit."

In the case of *Poske* v. *Mergl,* 169 Ohio St. 70, 157 N.E. 2d 344, this Court stated the rule in relation to "weight" or

"sufficiency" of the evidence, as a basis for a granting of a new trial. Paragraph one of the syllabus is as follows:

> "Where the evidence in the trial of a case is such that the case must be submitted to a jury to find for either the plaintiff or defendant, and where the trial court after its review of the evidence on a motion for a new trial is convinced that there is insufficient credible evidence to sustain a judgment upon the verdict of the jury, such court may, in its discretion, grant not more than one new trial for that reason."

The finding by the trial court that judgment should be rendered "upon the evidence received on the trial" is insufficient to authorize judgment for the defendants and the finding of the Court of Appeals that plaintiff "has not sustained the burden of proof resting upon him in support of the allegations in his petition" is likewise insufficient. The judgment must, therefore, be reversed and the cause remanded to the Court of Common Pleas for a new trial.

Judgment reversed.

WEYGANDT, C. J., MATTHIAS, BELL and HERBERT, JJ., concur.

ZIMMERMAN, TAFT and PECK, JJ., dissent.

## *Appendix C*

**Third Round—Opinion of the Court of Appeals, Seventh District, Mahoning County, Ohio, March 6, 1962**

[CAPTION OMITTED]

DONAHUE, J.

This case comes before this court for the third time.

On the first occasion the Supreme Court in *Perko* v. *Union,* 168 Ohio St. 161, held that the petition stated a cause of action under the common law.

On the second occasion the Supreme Court in *Perko* v. *Union,* 171 Ohio St. 68, in a per curiam opinion, said that the common pleas court in granting judgment for defendant after a disagreement by the jury, had failed to explicitly find that there was no evidence to support a judgment for plaintiff and, therefore, could not enter judgment for defendant.

On this, the third occasion, we find a jury verdict for plaintiff.

The petition in this case alleges a conspiracy by the union and its members to keep plaintiff from working as a foreman or superintendent. When this cause arose, plaintiff had been a superintendent for The William B. Pollock Company in connection with blast furnace repair and construction. Difficulties between Ironworkers and Boilermakers were being ironed out, when plaintiff was accused, as an Ironworker, of aiding Boilermakers in learning Ironworker's work, in contravention to the Ironworkers' rules and constitution.

At a Union trial, he pled guilty and was fined. Said fine was later suspended by the International.

Following this trial, the small group of iron workers on the job plaintiff was supervising, refused to take orders. No work stoppage occurred, since the orders were given by bypassing plaintiff and giving orders directly to foremen. Plaintiff continued on the job in other respects, was paid to the end of the job's contract. He suffered no financial loss

because of the Ironworkers' conduct. In fact he continued to draw pay for some weeks after this contract's completion.

Evidence shows that when a contractor had a job contract, such as Pollock's had above, they could hire Ironworkers directly, or could call the Union who would furnish the necessary men. However, the contractor and the contractor alone had the privilege of picking the superintendents and foremen. The foremen generally had to have Union Books but superintendents did not. Under the union contract with the contractors, the union had no control over the picking or employment of foremen or superintendents. Therefore there could be no such thing as "foremen's rights" as such.

From the evidence, it appears that at no subsequent time did plaintiff, who was about 68 at that time, ever secure a job as foreman or superintendent. He in each of several subsequent years, did work, as an ironworker, but his employment was always terminated before he earned $1,200.00 in any year. He was also on social security.

The evidence given by plaintiff indicates that he talked to a number of contractors, albeit somewhat vaguely, about his "foreman's rights." It would seem that he had a habit on these occasions of advising the contractor or superintendent that his "foreman's rights" had been suspended.

Only one representative of a contractor, Francis Walsh, of Pollocks indicated that he had ever contacted the Union with regard to these "foreman's rights." He testified that as the result of these contacts, he believed that he would run into troubles if he hired plaintiff.

This is the only testimony which supports plaintiff's claims in any respect.

Defendant is before us on twenty-three assignments of error. For their own convenience, counsel has argued them under five "arguments."

For our convenience we will consider the salient points raised.

Defendant maintains the acts alleged are protected under

the National Labor Relations Act, Section 7. The question as to whether the petition in this case states a common law cause of action was disposed of, as we show above, in *Perko* v. *Union,* 168 Ohio St. 161. It is continually urged, however, that that phase of this case did not consider the question of the protection afforded by Section 7.

It is true that Section 7 protects the men and union when they organize for, among other things, "other mutual aid or protection." But we see nothing in these words which allow them to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law action is not eliminated.

The second point raised is as to the sufficiency of the evidence to take the case to the jury. We agree that with all the testimony, there is very little that supports the cause sued on here. And yet we cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for plaintiff. Under the ruling in the second *Perko* v. *Union* appeal, 171 Ohio St. 68, to support a directed verdict, the trial court would have had to so find. We are bound by this case.

We find no other error or "argument" to be prejudicial to defendant.

Judgment affirmed.

BROWN, P. J., Concurs.

GRIFFITH, J., Concurs.

## *Appendix D*

**Third Round—Order of Supreme Court of Ohio, July 5, 1962**

This cause, hereby on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendants-appellants his costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

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# In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 482.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, *et al.*,

*Petitioners,*

vs.

JACOB PERKO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

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# In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 482.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, *et al.*,

*Petitioners,*

vs.

JACOB PERKO,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

## BRIEF FOR RESPONDENT IN OPPOSITION.

## RESTATEMENT OF QUESTION PRESENTED.

The question presented for review is as follows:

Whether the National Labor Relations Act precludes a State court from exercising jurisdiction in a tort action brought by a supervisor against the union to which he formerly belonged where he seeks damages (and not reinstatement) for an unlawful interference with his employment?

## ADDITIONAL STATUTES INVOLVED.

Section 14 of the National Labor Relations Act as amended, 29 U. S. C. Section 164(a):

> "(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Section 8(b)(1) of the National Labor Relations Act as amended, 29 U. S. C. Section 158(b)(1):

> "(b) It shall be an unfair labor practice for a labor organization or its agents * * *
>
> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: Provided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Other applicable sections of the National Labor Relations Act are set forth in the Petitioners' Brief on pages 3-6.

## RESTATEMENT OF THE CASE.

The chronological statement of the case as set forth in Petitioners' Brief (pages 6-14) is substantially correct. However, in setting forth the "idence established" in the trial under the heading "The Third Round" (pages 9-14), counsel for Petitioners are careful to omit the substantial testimony introduced on behalf of the Plaintiff-Respondent to prove by a preponderance of the evidence that the defendant union had committed a common law tort when, without justification, it interfered with plaintiff's right of employment.

Counsel for Respondent will not attempt to review the evidence, it being assumed, as counsel for Petitioners concede, that the necessary elements of plaintiff's common law action for wrongful interference with his employment were established by competent evidence at the trial of this cause.

## STATEMENT.

It is submitted that this cause presents no question that would warrant the granting of a writ of certiorari. The decision of the Ohio court is clearly correct and is not in conflict with prior decisions of this Court. A review of this action, which is peculiarly private in nature, will not resolve or substantially clarify any public policy or any federal question of great public interest.

## ARGUMENT:

The question in the present case does not warrant review by this Court for the following reasons:

### I.

### The Decision of the Ohio Court Is Correct and Clearly in Accord With Settled Principles Enunciated by This Court.

The plaintiff was a job superintendent for the William B. Pollock Company at the time the union committed the tort,[1] and had been employed as a job superintendent for approximately nine years prior thereto. The union's unlawful interference with plaintiff's employment caused the plaintiff to be discharged.[2] The plaintiff's employer and immediate supervisor testified:

> "That we could not use him any longer because he could not work as a job superintendent due to his dispute with the union."[2]

As a job superintendent, plaintiff was specifically exempt from the Act,[3] and being exempt, he could not claim protection under the Act,[4] even though he was a union member.[5]

The facts in the instant case as they appear in the transcript of testimony cannot be enlarged by argument of counsel. Plaintiff was *not* a "foreman." He was job superintendent in charge of all crafts working on the construc-

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[1] Tr. 6, Tr. 40-41.

[2] Tr. 31.

[3] 29 U. S. C., Par. 152 (3).

[4] *N. L. R. B. v. Inter-City Advertising Co. of Charlotte, N. C.*, 190 F. 2d 420 (1951), *certiorari denied*, 342 U. S. 908;
*L. A. Young Spring & Wire Corp. v. N. L. R. B.*, 163 F. 2d 905 (1947), *certiorari denied*, 333 U. S. 837.

[5] 29 U. S. C., Par. 164 (b).

tion project. He had the right and power to hire and fire. The action of the union had nothing to do with his employer, The William B. Pollock Company, or with the selection of representatives for the purpose of collective bargaining or the adjustment of grievances under Section 3(b)(1)(B) of the Act. Plaintiff's employer testified:

> "* * * as I stated before, this was not a jurisdictional dispute, it was between the man and his union * * *."[6]
>
> * * * * *

Even if Respondent were an employee within the meaning of the National Labor Relations Act, there is no substantial basis for arguing that the union's unlawful actions were prohibited by the Act.

Plaintiff was a dues paying member in good standing at the time the union committed the tort. The union's action could not constitute an unfair labor practice under the Act because a union's unlawful action against a member cannot be interpreted as having as its purpose the encouraging or discouraging of membership in a labor organization. Counsel for Petitioners have failed to cite any cases holding that the acts complained of by the plaintiff constitute an unfair labor practice.

It is stated at page 18 of Petitioners' brief that "The substance of plaintiff's claim in this case was that, *because he violated a union rule*, the union * * * forced the plaintiff's employer to discharge him * * *." (Emphasis supplied.) This same *factual assumption* is contained in Petitioners' statement of the Question Presented by this cause. Petitioners then conclude that *Radio Officers v. N. L. R. B.*, 347 U. S. 17 (1950) is in point. At the trial there was testimony of a fine being imposed on plaintiff for purportedly violating a union rule. However, the fact

[6] Tr. 345.

that the union held a trial concerning plaintiff's violation of a union rule and the fact that plaintiff was fined *were not elements of the common law tort committed by the union and were not considered by the jury at the trial of this action.*[7] Therefore, the violation of a union rule cannot *now* be asserted by counsel as the basis for an unfair labor practice by the union.

* * * * *

Petitioners imply but do not argue that the conduct of the union is protected by Section 7 of the Act. Section 7 protects employees' rights to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is obviously a section guaranteeing and protecting employees' rights to organize, bargain collectively, and to engage in concerted activities, and does not even remotely concern itself with protecting the individual union member against misconduct against himself by his own union.

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[7] At the trial, counsel for defendant union requested that the court specially instruct the jury as to this conduct on the part of the union, which request was granted, and the jury was instructed as follows:

> "Members of the jury, I charge you as a matter of law that the trial of Jacob Perko by the Executive Board of the Defendant Union on December 8, 1953, was an exercise of a lawful right of the Executive Board of the Defendant Union.
>
> "The findings and penalty of the Local Union as modified by the International Union cannot be questioned in this Court in this proceeding.
>
> "Therefore, the trial, the findings, and the penalty may not be used as evidence of a conspiracy by the Defendant Union against the plaintiff, Jacob Perko." (Tr. 424; see also Tr. 436.)

*International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245 (1948); *N. L. R. B. v. Dallas General Drivers, Warehouseman & Helpers Local No. 745, AFL-CIO*, 264 F. 2d 642 (1959), *certiorari denied*, 361 U. S. 814.

The plaintiff-respondent's claim for damages is created by the laws of his state that have general application to all persons, corporations and associations. His claim is not predicated on or created by the N. L. R. A. or any other law relating to unions. Petitioners cannot show factually that plaintiff was not a supervisor and therefore exempt from the Act or that the precise conduct of the union *as disclosed by the testimony at the trial* was either protected or prohibited by the Act. Without such proof there can be no pre-emption.

## II.

## The Decision of the Supreme Court of Ohio Is Not in Conflict With the Garmon Case.

Assuming that petitioners' statement of the question presented by this cause was factually correct, petitioners are incorrect in their claim that the "decision of the Supreme Court of Ohio in this case is in direct conflict with the decision of this Court in the second *Garmon* decision: *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959)."

The *Garmon* case involved the broad question of federal pre-emption of a state court action in a particular area of labor management relations. By virtue of its Constitutional power over interstate commerce,[9] Congress has regulated in the field of labor management relations.[10] Under the supremacy clause of the Constitution,[11] federal legislation pursuant to these delegated powers is said to pre-empt the field, except that a state may act concur-

[9] *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

[10] *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

[11] *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824).

rently, provided no conflict results and provided further that Congress has not shown an intent to occupy the field exclusively.[12]

The enactment of the Labor Management Relations Act was indicative of Congressional determination that certain areas within the field of labor management relations required uniformity of regulation.[13] The areas pre-empted by the Act are not susceptible of fixed metes and bounds and must be judicially defined.[14]

The question of federal pre-emption has been placed before this Court in the following recent cases: *United Constr. Workers v. Laburnum Constr. Co.*, 347 U. S. 656 (1954); *United Automobile Workers v. Russell*, 356 U. S. 634 (1958); *International Association of Machinists v. Gonzales*, 356 U. S. 617 (1958); and *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959). These cases, applying the principles enunciated in prior decisions of this Court, were the guideposts followed by the Supreme Court of Ohio in its review of this cause below.

In the *Laburnum* case, this Court affirmed the Virginia court's award of damages to an employer for a common law tort, there being violence involved. This Court found no conflict between the state and federal law because the remedy given by the state court was not provided for in the federal act. Further, this Court held that the state was enforcing a private right, whereas the federal statute dealt with public rights.

In the *Russell* case, this Court affirmed the Alabama court's award of damages to an employee for a common

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[12] *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1942).

[13] *Garner v. Teamsters Union*, 346 U. S. 485 (1953).

[14] *Weber v. Anheuser-Busch*, 348 U. S. 468 (1955).

law tort, there being violence involved. This Court found that Congress had not intended to pre-empt the field of damages recoverable from tortious conduct by the provisions for reinstatement to employment and the discretionary back pay awards under the Act.[15] The mere possibility of partial relief in the form of back pay at the hands of the federal agency was insufficient justification for refusing an employee the right to recover in a state court *all* damages sustained as a result of tortious conduct, even though the same conduct might be an unfair labor practice.[16] This Court further found it "erroneous to characterize" a back pay order as "penal or as the adjudication of a mass tort."[17]

In the *Gonzales* case, this Court affirmed the California court's order of reinstatement to a union member unlawfully expelled from his union and the court's award of damages resulting from the breach of the union constitution which consfituted a contract between the union and its members. This Court found that the Act does not provide a remedy of reinstatement to union membership and that the partial relief of a back pay award under 10(c) of the Act does not deprive the individual from available state court remedies to recover *all* damages sustained. This Court further found that "the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member."[18]

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[15] *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) at p. 641-642.

[16] *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) at p. 646.

[17] *United Automobile Workers v. Russell*, 356 U. S. 634 (1958) at p. 643.

[18] *International Ass'n of Machinists v. Gonzales*, 356 U. S. 617 (1958) at p. 621.

In the *Garmon* case, this Court reversed a judgment of the California court awarding damages to an employee resulting from peaceful picketing, such action being a tort under the California Labor Code. This Court stated, "It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority."[19] This Court emphasized the facts involved in the *Garmon* case. "They regulate the vital economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions."[20] "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. (Cases cited.) However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Assn. of Machinists v. Gonzales*, 356 U. S. 617."[21]

Counsel for Petitioners categorize the *Russell* and *Laburnum* situations as tort actions involving violence and the *Gonzales* situation as a contract action wherein reinstatement in the union is sought and that these two fact situations constitute the *only* exceptions to the rule

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[19] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) at p. 247.

[20] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) at p. 241.

[21] *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959) at p. 243-44.

of pre-emption. Obviously the National Labor Relations Act has not attempted to define tort actions or contract actions or even crimes that may be or may not be committed by unions against their members. Likewise, this Court has not categorized as pre-empted by the National Labor Relations Act general tort actions against unions either with or without violence. As has been pointed out by this Court the touchstone of pre-emption is conflict with an established federal policy. The form of the action, whether it be in contract or in tort, is of importance only to the extent that the relief sought has an effect on an established federal policy.

The *Gonzales* and *Garmon* cases mark the polarity of considerations which arise in balancing the roles of state and federal courts in the labor-management field. *Garmon*, at one extreme, involved legitimate union use of a vital weapon in labor management relations—peaceful picketing. Use of such a weapon was clearly an element of concern to the framers and modifiers of the N. L. R. A. Mindful of Congressional interest in peaceful picketing, this Court was reluctant to permit the state courts to interfere in any way with picketing so long as it was conducted in a lawful, peaceful fashion.

*Gonzales* by contrast involved the highly individual problem of a single individual seeking work and the question of internal union affairs, neither of which were matters of substantial regulative concern to the framers of the N. L. R. A. *Gonzales* did not raise the exigencies of direct relations between an organized economic force, the employer, and concerted action by workers through a union. This Court properly termed the union-member relationship "peripheral to the policies of N. L. R. A." and, as stated in *Garmon*, it considered the needs of democracy,

the preservation and protection of the private rights of the individual, paramount to the N. L. R. A.'s concern with group action.

The Supreme Court of Washington has in similar common law tort actions for unlawful interference with one's employment followed the principles outlined by this Court. The case of *Selles v. Local 174, International Brotherhood of Teamsters*, 50 Wash. 2d 660; 314 P. 2d 456 (1957), is cited with disapproval in Petitioners' Brief (page 24), although this Court refused to grant certiorari[22] after having decided the *Russell* and *Gonzales* cases.[23]

The *Selles* case was an action by a discharged superintendent against a union and its members for having caused the employing company to bring about his discharge, the *exact* facts presented by the instant case. The Washington Supreme Court in the *Selles* case, quoting from its prior decision in *Baun v. Lumber & Sawmill Workers Union*, states:

> "Further, we put our conclusion that the Washington courts have jurisdiction of the subject matter of this litigation on the still broader base that the traditional jurisdiction of a state court to enforce a common law tort liability has not been removed, *at least in such a case as the present*, by the Labor Management Relations Act, even though the tortious conduct constitutes an unfair labor practice under the Act.
>
> "In considering this phase of the jurisdictional question, it is well to note at the outset *what the plaintiff is not asking*.

---

[22] 356 U. S. 975.

[23] See also *Guzzo v. Steelworkers*, (Calif. 1960), 40 Labor Cases, par. 66,430, *certiorari denied*, 365 U. S. 802 (1960).

"He is not asking that any activities of the union or its members, or that any action by the company be restrained or enjoined; he is not asking that he be reinstated in his position, nor is he asking for back pay. He is not claiming that he is or was an employee within the purview of the Labor Management Relations Act.

"He accepts as *fait accompli* his discharge as superintendent of the company's mill. He alleges that his discharge was achieved in connection with and by means of an unlawful conspiracy, and that the union and its members, without cause or justification, caused his discharge by a threat to strike. His common law action for unlawful interference with his employment or for conspiracy to unlawfully interfere with his employment, and his right to damages therefor differs from any remedy which the National Labor Relations Board has power to provide, and *it does not invoke any question of present or future relations between a company and himself, or the company and its other employees.*

"We know that the Federal Government has preempted the field as to many phases of labor relations, but not as to all. We cannot find from the Act, as interpreted by the Supreme Court, that it was the intention of Congress to deprive a workman of his time honored right to sue in his own state court for damages resulting from a common law tort and to relegate him, for sole relief, to this particular federal agency." (Emphasis by the Court.)

Counsel for petitioners brush off the reasoning of the *Selles* case as being a "pre *Garmon*" case. The *Selles* case does not broadly hold that all tort actions for damages are not pre-empted by the Act. The *Selles* case *does* hold, as does *Garmon, Russell, Laburnum* and *Gonzales* that common law tort actions that might also be unfair labor practices are not pre-empted by the Act if the Act does not

provide an adequate remedy and the action by a state court will not interfere with the basic policy of the Act.

It cannot be argued with reason that Mr. Jacob Perko, the plaintiff in the instant case, must phrase his cause of action in contract and first seek reinstatement in order to open the avenue for a damage action under the holding in the *Gonzales* case. There is no possibility of *any* conflict with federal labor management policy if the injured party completely removes himself from the labor management relations area and sues in tort. By so doing, he removes himself even beyond the "merely peripheral concern of the Labor Management Relations Act." [24]

## III.

## No Important Question of Federal Law Is Involved.

The United States Supreme Court must, of necessity, confine its review of cases to those where its review "is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered." [25]

The pre-emption question involved in this action has previously been before this Court, and has been decided by this Court. The Supreme Court of Ohio has properly applied the principles enunciated by this Court in its prior decisions to the facts of this particular action.

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[24] *International Ass'n of Machinists v. Gonzales*, 356 U. S. 617 (1958); *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 at p. 243 (1959).

[25] Chief Justice Hughes, Address to American Law Institute, May 10, 1934 *Proceedings of American Law Institute, XI*, p. 313 (1934).

No purpose consistent with the language of Chief Justice Hughes quoted above would be served by granting the petition for a writ of certiorari. The questions raised by Petitioners relate to this particular case only and turn on the facts of this particular case. There is no controversy of substance with respect to any legal principle.

## CONCLUSION.

It is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 482

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS, AND JAMES CASTNER

*Petitioners.*

v.

JACOB PERKO

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

---

## PETITIONER'S REPLY BRIEF

---

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## PETITIONER'S REPLY BRIEF

### I. RESPONDENT'S LEGAL ARGUMENTS

The bulk of Respondent's Brief in Opposition is devoted to an attempt to show that "The decision of the Supreme Court of Ohio is not in conflict with the Garmon case." (Br. in Opp. 7-14) The thrust of Respondent's argument, as we understand it, is that the National Labor Relations Act pre-empts state court jurisdiction only in cases involving disputes between unions and employers, which generally involve strikes or picketing. The principles enunciated in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), Respondent contends, apply only to such cases. These are the matters which, according to Respondent, are entrusted by the National Labor Relations Act to the exclusive jurisdiction of the National Labor Relations Board.

This case, Respondent contends, is akin to *International Ass'n of Machinists* v. *Gonzales,* 356 U. S. 617 (1958), which he characterizes as follows:

> "Gonzales . . . involved the highly individual problem of a single individual seeking work and the question of internal affairs, neither of which were matters of substantial regulative concern to the framers of the N.L.R.A."

The essential fallacy of this argument lies in its premise. The Act is not concerned solely with the relations between unions and employers. At least since the enactment of Taft-Hartley in 1947, the relations between unions and employees have been also subject to federal regulation. It is true that the Act does not concern itself with the rights of *union members as members.* It does not deal directly with exclusion from membership, expulsion from membership, or internal union discipline. It was for this reason that this Court reached the result that it did in *Gonzales,* which involved an action for wrongful expulsion from membership.

But when the claim upon which relief is sought is not union interference with membership rights but union interference with employment or employment opportunity, the Act as very much concerned. This is precisely what the Act deals with in Sections 8(b)(2) and 8(a)(3). As this Court stated in *Radio Officers* v. *NLRB,* 347 U. S. 17, 40 (1954), "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

The Act is also concerned, as we pointed out in our Petition, with the protection of the relationship between employers and their supervisors from union interference. Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B); *International*

*Typographical Union*, 123 N.L.R.B. 806 (1959), *enforced* 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided court*, 365 U. S. 705 (1961).

There is, of course, absolutely no basis for assuming that these aspects of the federal labor policy are less important than other aspects, or that they are any less subject to the exclusive jurisdiction of the National Labor Relations Board. Indeed, one of the earliest pre-emption cases in this Court was a state proceeding against an employer for discharging, and against a union for coercing the employer to discharge, an employee who had resigned his union membership. *Plankington Packing Co.* v. *Wisconsin Employment Relations Bd.*, 338 U. S. 953 (1950), *reversing* 255 Wis. 285, 38 N.W. 2d 688 (1949). The reasoning of *Garmon* and related decisions of this Court is therefore as applicable to the present case as to cases involving strikes, picketing, or similar conflict between unions and employers. The rule which this Court has clearly established is that the NLRB has exclusive primary jurisdiction over any matter which falls within the area regulated by the Act—*i.e.*, any matter which is "arguably" an unfair labor practice. There is simply no basis in any of this Court's opinions for the suggestion that this rule applies only to certain unfair labor practices and not to others. The only exceptions are cases involving violence, and cases involving union *membership* rights (as distinguished from *employment* rights) of individual employees. As we demonstrated in our petition, neither of these exceptions is applicable here.

## II. RESPONDENT'S FACTUAL ARGUMENTS

We would like to deal briefly with two factual matters raised in Respondent's brief. First, Respondent states that, at the time the plaintiff was discharged, he was working as a "job superintendent." That is correct. However, if Respondent means to imply that the cause of action in this

case involved only the union's alleged interference with plaintiff's employment as a job superintendent, that is simply not the fact. The complaint alleged that the union had interfered with plaintiff's employment as both a "foreman" and a "superintendent." (R. 99) The testimony introduced by plaintiff was that, prior to his discharge, he had worked as both a foreman and a superintendent (Tr. 6-7), and that subsequently he had been unable to obtain employment in either capacity. (Tr. 78, 87, 102-3). The trial judge's instructions to the jury clearly stated that the theory of the action was that the union had interfered with plaintiff's employment both as a foreman and as a superintendent (Tr. 419, 442, 443-44). In its first opinion in this case, the Supreme Court of Ohio stated:

> "Plaintiff alleges . . . that defendants, without justification, conspired to deprive plaintiff of his right to continue to work as foreman for the William P. Pollock Company and as foreman for any other company in the geographic jurisdiction of Local No. 207, by suspending his foreman's rights, by demanding that the Pollock company discharge plaintiff as superintendent and foreman and by instituting a strike against the Pollock company for the sole purpose of coercing the company to discharge him; that in consequence thereof plaintiff was discharged; and that defendants have prevented plaintiff from procuring employment as a foreman." (Petition, App. A, p. 28)

Similarly, the Ohio Court of Appeals, in its opinion in this case, states that "the petition in this case alleges a conspiracy by the union and its members to keep plaintiff from working as a foreman or superintendent." (Petition, Appendix C, p. 36)

As we pointed out in our Petition, it is probable that both interference with plaintiff's employment as a superin-

tendent[1] and interference with his employment as a foreman[2] would constitute unfair labor practices. Nevertheless, since Respondent has accused us of "enlarging" the facts, we felt that it was important to clarify the matter.

Second, Respondent has accused us of making a "factual assumption" that the union sought plaintiff's discharge for violation of a union rule. The record shows, however, that plaintiff's theory—which the jury presumably sustained—was that the union sought his discharge because he had violated the union's rule regarding the instruction of boilermakers. Thus, the testimony of the plaintiff's employer, elicited by plaintiff's counsel, was that the union steward "said that Mr. Perko was educating the boilermakers in their particular work; so that they felt they weren't going to take orders from him any more." (Tr. 14) And it was the plaintiff who introduced the evidence of plaintiff's union

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[1] Respondent contends that "as a job superintendent, plaintiff was specifically exempt from the Act, and being exempt, he could not claim protection under the Act, even though he was a union member." This is simply an inaccurate statement of the law. The cases relied upon by Respondent are cases holding that a supervisor is not protected against discrimination by his *employer*. *NLRB* v. *Intercity Advertising Co.*, 190 F. 2d 420 (4th Cir. 1951), *cert. denied*, 342 U. S. 908 (1952); *L. A. Young Spring & Wire Corp.* v. *NLRB*, 163 F. 2d 905 (D. C. Cir. 1947), *cert. denied*, 333 U. S. 837 (1948). Those cases are correct. But what was involved here was interference by the *union*, which, as we pointed out in our Petition, has been held to be an unfair labor practice under Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B). *International Typographical Union* v. *NLRB*, 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided Court*, 365 U. S. 705 (1961).

[2] As we pointed out in our Petition (pp. 19-20) a "foreman" as the term is used in this case is probably an employee. Respondent does not seem to dispute this. We wish to point out, however, that this question is not one which this Court must decide to dispose of this case. As was clearly held in *Marine Engineers* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962), this is the type of question which must be left to the Board. For present purposes, it is sufficient that foremen are "arguably" employees, and it seems to be conceded that they are.

trial, and attempted to link it to plaintiff's subsequent discharge and inability to find employment. (Tr. 59-64).

It is true, of course, that the essence of the alleged tort was the union's interference with the plaintiff's employment, not the union trial or fine. Indeed, it is this fact, as we state in our Petition, which distinguishes this case from *Gonzales*. But in order to recover, plaintiff had to show not only that the union interfered with his employment, but that it did so "without justification." To establish that element, plaintiff attempted to prove that the union had injured the plaintiff because of his violation of the union rule. This is the plaintiff's "factual assumption," not ours. It was on the basis of a jury verdict sustaining this "factual assumption" that plaintiff recovered damages.

## III. ANOTHER CASE, NOW PENDING ON PETITION FOR CERTIORARI, RAISES THE SAME QUESTION AS IS INVOLVED IN THIS CASE.

We wish to call to the Court's attention the fact that a petition for certiorari has recently been filed in a case entitled *Local 100, United Association* v. *Borden*, No. 541, which raises the same question as is raised here. In that case, the plaintiff sought damages against his union in the Texas courts for wrongful interference with his employment, alleging that the union refused to give him a job referral, and that as a result he was unable to obtain employment which would otherwise have been available to him. The trial court initially dismissed the suit holding, *inter alia*, that "jurisdiction of a suit by an employee to recover for union interference with employment, or discrimination in employment opportunity, is within the Jurisdiction of the National Labor Relations Board . . ." (Pet. for Cert. No. 541, p. 5.) The Texas Court of Civil Appeals first affirmed the judgment, but then, on rehearing, reversed itself, citing this Court's decision in *Gonzales*, which had been rendered in the interim. *Borden* v. *United Association*, 316 S.W. 2d 458 (1958). The case then went back for trial, which re-

sulted in a judgment for the plaintiff. The pre-emption question was again raised on appeal, and again overruled by the Court of Civil Appeals, *Local 100, United Association v. Borden,* 355 S.W 2d 729. The Texas Supreme Court denied a writ of error.

The *Borden* case is yet another illustration of the fact which we pointed out in our Petition that many state courts are misreading and misapplying *Garmon* and *Gonzales.* The claim in *Borden,* as in the present case, was that the union had interfered with the plaintiff's employment. In both cases, the type of interference alleged would, if proved, have probably been an unfair labor practice under the Act. Yet in both cases state courts exercised jurisdiction on the ground that this Court's decision in *Gonzales* permitted it, thereby completely overlooking the fact that *Gonzales* involved not a claim for interference with employment but wrongful expulsion from membership.

The fact that there are two such cases pending in this Court at the same time demonstrates the importance of the question, and also provides this Court with a propitious opportunity for resolving it once and for all.

## CONCLUSION

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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*Petitioners.*

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JACOB PERKO

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*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

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## BRIEF FOR PETITIONERS

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## BRIEF FOR PETITIONERS

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### OPINIONS BELOW

The first opinion of the Supreme Court of Ohio (R. 8), reversing an order of dismissal for lack of jurisdiction and remanding the case for trial, is reported at 168 Ohio St. 161, 151 N. E. 2d 742.

The second opinion of the Supreme Court of Ohio (R. 16), reversing a judgment for defendants and ordering a new trial, is reported at 171 Ohio St. 68, 167 N. E. 2d 903.

The opinion of the Court of Appeals of the Seventh Appellate District of Ohio (R. 182), affirming the judgment

for plaintiff entered after the second trial, is not yet officially reported. It is reported unofficially at 90 Ohio L. Abs. 65.

The order of the Supreme Court of Ohio dismissing the defendants' appeal as of right for lack of a "debatable constitutional question" is reported at 173 Ohio St. 576, 184 N. E. 2d 100.

## JURISDICTION

The final judgment of the Supreme Court of Ohio was entered on July 5, 1962. The petition for certiorari was filed in this Court on October 3, 1962, and granted on December 17, 1962. This Court has jurisdiction under 28 U. S. C. § 1257 (3).

## QUESTIONS PRESENTED

Whether the National Labor Relations Act precludes a state court from exercising jurisdiction in an action for damages brought by a union member against his union based on the claim that the union wrongfully forced his employer to discharge him, and other employers not to hire him, because he had violated a union rule.

## STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Article 6, Clause 2 of the Constitution of the United States provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 2(3) of the National Labor Relations Act, 49 Stat. 450 (1935), as amended, 29 U. S. C. § 152(3) (1958), states as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor. . . ."

Section 2(11) of the Act, 49 Stat. 450 (1935), as amended, 29 U. S. C. § 152(11) (1958), states as follows:

> "The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 7 of the Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 157 (1958), states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 158(a)(3) (1958), states in pertinent part as follows:

"It shall be an unfair labor practice for an employer—

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made; . . . provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b) of the Act, 61 Stat. 140 (1947), 29 U. S. C. § 158(b) (1958), states in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the

exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

Section 10(a) of the Act, 49 Stat. 453 (1935), as amended, 29 U. S. C. § 160(a) (1958), states as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

## STATEMENT OF THE CASE

This case comes to this Court after having been through the courts of the State of Ohio three times. In order to understand the nature of the federal questions presented, and the manner in which they were raised below, it is necessary to review the somewhat long and tortuous history of this litigation.

### *The First Round*

On February 8, 1956, the plaintiff, Jacob Perko, filed a petition in the Court of Common Pleas of Mahoning County, Ohio, against Local 207 of the International Association of Bridge, Structural, and Ornamental Iron Workers (hereinafter referred to as the union) and certain of its individual officers as representatives of the members of that Local, seeking damages under the state common law (R. 1). The petition alleged that for many years the plaintiff had been a member in good standing of the union and had been employed as a "foreman" by the William B. Pollock Company. It further alleged that the defendants, "without justification," conspired to deprive the plaintiff of his right to work for that company or "for any other company in the geographic jurisdiction of Local 207" either as a "foreman" or "superintendent," and that, in furtherance of this conspiracy, the defendants first demanded that the Pollock Company discharge the plaintiff from employment, and subsequently "instituted a strike" against the company "for the sole purpose of coercing the William B. Pollock Company into discharging the plaintiff." As a result, according to the petition, plaintiff was discharged from his employment, and prevented from obtaining other employment, all to his financial detriment.

Defendants filed an answer (R. 3) and a motion to dismiss the petition on the ground that the court lacked jurisdiction over the subject matter (R. 5). In support of the motion, defendants argued, first, that the conduct alleged to have been engaged in by defendants would, if proved,

constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board, and second, that plaintiff has failed to exhaust the remedies available to him under the union's constitution and by-laws (R. 9). The court, after argument, dismissed the action on the second ground (R. 5), and the plaintiff appealed.

The Ohio Court of Appeals of the Seventh Appellate District affirmed the judgment without opinion (R. 6). The plaintiff then appealed to the Ohio Supreme Court, which reversed the judgment below and remanded the case for trial.

The Supreme Court wrote an opinion (R. 8) which dealt with both of the defendants' arguments. It first disposed of the ground on which the trial court had relied—plaintiff's failure to exhaust internal union remedies—by holding that plaintiff was not seeking to redress any of his rights as a member of the union, but was seeking to remedy the alleged interference with his employment relationship, a common law tort, to which no internal union remedies were applicable.

Turning then to the question of federal pre-emption, the court stated the following:

> "Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell,* and *Interna-*

*tional Association of Machinists* v. *Gonzales* (decided May 26, 1958), 355 U. S. ————" (R. 9-10).

Accordingly, the case was remanded for trial.

### *The Second Round*

On remand, the defendants amended their answer by adding as an additional defense the allegation that the conduct alleged to have been engaged in by the defendants was a protected activity under Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U. S. C. § 157 (1958) (R. 12). The case was then tried to a jury. Defendants moved for a directed verdict at the close of plaintiff's case and at the close of the trial, but the court permitted the case to go to the jury. However, the jury was unable to reach a verdict and the court then granted defendants' motion and directed a verdict in their favor (R. 13).

On appeal, this judgment was affirmed by the Court of Appeals without opinion (R. 14), and the plaintiff again appealed to the Ohio Supreme Court.

The Supreme Court again reversed and remanded the case for a second trial. Stating that "the jurisdiction of the trial court to hear this action was determined by this court in its prior decision," the court dealt in depth only with the question of whether the trial court had applied the correct test in determining whether the evidence justified a directed verdict. On this question, the court held that "the finding of the trial court that the defendant is 'entitled by law to judgment upon the evidence received on the trial' was not a finding that there was no evidence to support a judgment for the plaintiff," and that the directed verdict must therefore be set aside and the case remanded for another trial (R. 17). Three of the judges noted their dissent, but wrote no dissenting opinion.

### *The Third Round*

The case was then tried a second time. The evidence established that plaintiff was a member of the defendant union, which represents iron workers in the Youngstown, Ohio area. He had for many years been employed by the William B. Pollock Company (R. 22), a firm engaged in the business of erecting blast furnaces and performing similar fabrication and construction work for the basic steel industry in various parts of the country (R. 27-28, 132). The Pollock Company was covered by a collective bargaining agreement between the Steel Erectors Chapter of the Mahoning Valley Builders Association, with which it was affiliated, and the union (R. 89).

Plaintiff generally worked as either a "foreman" or a "superintendent" (R. 22). A "superintendent" is the supervisor of an entire construction project. Under him work a number of groups of employees, of various crafts, each represented by the appropriate craft union. One member of each such craft group is designated as its "foreman," and has the responsibility of receiving orders from the superintendent and transmitting them to his particular crew (R. 50-51, 111, 127). Unlike the superintendent, the foreman is always a member of the union (R. 103), and his wages, while somewhat higher than those of the other crew members, are established by the collective bargaining agreement (R. 90).

Over a period of years, there had been a dispute between the defendant union and another union, the Boilermakers, as to which union should perform the work of erecting blast furnaces (R. 29-31, 91-92). As a result of this dispute, the defendant union in 1951 adopted a rule providing "that any member that leaves the iron workers to go in as a boilermaker or assist them in any way will be fined $500." (R. 106).

In December, 1953, plaintiff was superintendent of a Pollock project at the Ohio Works of United States Steel

Corporation (R. 23). In that capacity, he instructed boilermakers in the performance of work which the iron workers claimed (R. 43-44). The dispute over which union was entitled to the work was referred to a "labor management committee" established by agreement among the various unions and employers in the construction industry, and work on the job was halted pending settlement of the dispute (R. 32-33). The same basic dispute also caused a strike at another Pollock Company project at Hubbard, Ohio (R. 32-33).

On December 4, 1953, plaintiff was charged, within the union, with having assisted boilermakers in violation of the union's rule (R. 164). He was tried, found guilty, fined, and suspended from membership pending payment of the fine (R. 54-55). The fine was later suspended by the parent International Union and plaintiff was placed on "probation" and permitted to resume payment of dues (R. 81).

The jurisdictional dispute was settled by an award of the labor-management committee, which gave some of the work to the iron workers and some to the boilermakers (R. 23).

The facts so far stated are not disputed. At this point, however, sharp conflicts appear in the testimony. According to the evidence introduced by the plaintiff, when the iron workers resumed work on the project where plaintiff was employed, they informed the Pollock Company that they would no longer take orders from plaintiff because he had assisted boilermakers (R. 9, 14). Plaintiff remained in the Pollock Company's employ until that particular job was completed, and for several weeks thereafter (R. 36-37). The Company's field superintendent testified that plaintiff was finally let go because of "his dispute with the union" (R. 37). He admitted, however, that he did not check with the union to see whether the "dispute" in fact still existed, but simply took plaintiff's word for it (R. 39).

Plaintiff testified that he subsequently tried to obtain em-

ployment with the Pollock Company, without success (R. 61-62). He also testified that the American Bridge Division of United States Steel Corporation offered "me a foreman's job if I could get straightened on the Union," but that he had told the Company that "I can't get straightened out" (R. 67). However, the construction superintendent of American Bridge, with whom plaintiff had spoken, remembered these events rather differently. He testified that there was no job available at the time the plaintiff spoke to him (R. 145), and that if there had been an opening he "probably would have" hired plaintiff, even though plaintiff had told him that the union had barred him from working as a superintendent or a foreman (R. 147). He also testified that he did not know that plaintiff was over age 65 at the time, and that, had he known, he could not have hired plaintiff in any event, because of his company's policy against hiring men of that age (R. 152).

Plaintiff admitted that he had not been refused employment by any employer other than the Pollock Company and American Bridge (R. 74). He also admitted that he had successfully obtained employment at several other companies (R. 70-73). The employment in each case was short. He did not earn more than $1200 in any year, and therefore his eligibility for old-age benefits under Social Security, which he was receiving throughout this period, was unaffected (R. 70-73).

The union representatives who testified denied that the union had in any way attempted to interfere with plaintiff's employment (R. 97, 109, 122). In addition, eight employers who employed iron workers represented by the union testified that the union had never said to them that they could not hire the plaintiff (R. 127, 129, 136, 138, 140, 143, 147, 159). Most of these employers were engaged in the same type of business as the Pollock Company, belonged to the same employer association, and were covered by the same collective bargaining agreement (R. 89).

At the close of the evidence, defendants moved for a directed verdict, on the twin grounds of insufficient evidence and federal pre-emption under the National Labor Relations Act. The motion was denied (R. 168).

The trial judge then instructed the jury. He first summarized the essential contentions of the plaintiff as follows:

> "That the Defendant union, its officers and members, conspired to deprive him of his right to continue to work as a foreman for not only the William B. Pollock Company but for any other company in this jurisdiction of the Local; that in furtherance of this that Defendant notified his employer, the William B. Pollock Company, that Plaintiff's foreman's rights had been suspended and demanded without cause that he be discharged from his employment;
>
> "That this company refused to do so and continued to employ him, the plaintiff, as foreman until January 26, 1954; that the Defendants then in the furtherance of their conspiracy to deprive Plaintiff of his right to work as foreman or superintendent unlawfully instituted a strike by the members of the Defendant Local against the Company on the job being performed at Hubbard, Ohio, for the sole purpose of coercing the William B. Pollock Company to discharge the Plaintiff as a foreman;
>
> "That as a consequence of this he was discharged from his employment by the William B. Pollock Company on that date;
>
> "That the Defendant since the time of this discharge without justification prevented plaintiff from procuring employment as a foreman in iron work by representing that he was suspended from the Union; that he, the Plaintiff, was at the time of filing this Petition 68 years of age, and that he had no other means of livelihood; that he had been earning previous to his discharge

> $15,000 a year and has not been able since to earn more than $1,000 per year . . ." (R. 170-171).

The Judge then proceeded to instruct the jury as to the applicable common law, stating, in effect, that if the plaintiff had proved the above contentions by a preponderance of the evidence then he would be entitled to recover damages (R. 173).

The jury, after extensive deliberations which almost ended in a deadlock, finally returned a verdict of $25,000 for the plaintiff (R. 177-79). The court entered judgment accordingly (R. 179), and denied the defendant's motions for judgment N.O.V. and for a new trial (R. 180-81).

Defendants appealed to the Court of Appeals, which affirmed the judgment. Accepting the prior decision of the Ohio Supreme Court as the law of the case, it held that the matter in controversy was not subject to the exclusive jurisdiction of the NLRB. In reply to defendant's argument that the conduct complained of was arguably protected by Section 7 of the National Labor Relations Act, the Court stated:

> "It is true that Section 7 protects the men and the union when they organize for, among other things, 'other mutual aid or protection.' But we see nothing in these words which allow them to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law action is not eliminated" (R. 184).

On the question of the sufficiency of the evidence to support the verdict, the court noted that "with all the testimony there is very little that supports the cause sued on here," but held:

> "We cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for plaintiff. Under the ruling in the second

> Perko v. Union appeal . . . , to support a directed verdict the trial court would have had to so find. We are bound by that case" (R. 184).

Defendants then appealed to the Supreme Court of Ohio, both by motion for an order directing the Court of Appeals to certify its record, and by invoking the right to appeal as to constitutional questions. The Court, without opinion, denied the motion to certify the record (R. 187), and dismissed the appeal on the ground "that no debatable constitutional question exists herein" (R. 189).

Having thus exhausted the available state remedies, defendants petitioned this Court for certiorari. The writ was granted on December 17, 1962 (R. 187).

## ARGUMENT

### *Introduction*

In this case the Court is again called upon to determine whether a state court has ventured into territory pre-empted by the National Labor Relations Act. The governing principle, which has evolved over a long time of decisions of this Court,[1] achieved its final formulation in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244-45 (1959):

> "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state juris-

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[1] See, *e.g.*, *Hill* v. *Florida*, 325 U. S. 538 (1945); *International Union, UAW v. O'Brien*, 339 U. S. 454 (1950); *Amalgamated Assn.* v. *Wisconsin Employment Relations Bd.*, 340 U. S. 383 (1951); *Garner* v. *Teamsters Local No. 776*, 346 U. S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955); *Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1 (1957); *Youngdahl* v. *Rainfair*, 355 U. S. 131 (1957); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962).

> diction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law . . .
>
> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board . . .
>
> ". . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

This rule, of course, is simply an implementation of the "Supremacy Clause" of Article 6 of the Constitution, which makes federal law "the supreme Law of the Land" and provides that "the Judges in every State shall be bound thereby." Since Congress has enacted a comprehensive statute regulating labor relations in industries affecting commerce, and since that statute vests the National Labor Relations Board with exclusive primary jurisdiction for its interpretation and enforcement, it follows that no state law may be applied to activities which are governed by the federal statute, and that no other tribunal, state or federal, can exercise the jurisdiction which Congress has entrusted exclusively to the Board.

This Court has recognized only two exceptions to this general principle. It has permitted the state courts to exercise jurisdiction in cases involving physical violence, even

though there may also be involved an arguable violation of the federal Act, because of the "compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace . . ." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. at 247 (and cases there cited). And it has permitted the state courts to exercise jurisdiction in suits based on alleged violations of union membership rights, on the ground that such matters are of "merely peripheral concern" to the federal regulatory scheme. *Id.* at 243. See *International Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (1958).[2]

There are thus two questions which this Court must decide in this case. The first is whether the conduct which the Ohio courts found to be tortious under state law is the type of conduct which is regulated by the National Labor Relations Act. The second is whether there is any basis in this case for applying either of the two established exceptions—or for fashioning a new exception—to the doctrine

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[2] This Court has also held that state courts may entertain actions for breach of collective bargaining agreements, even though the conduct which allegedly violated the agreement may also be an unfair labor practice. *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962). That decision, however, does not constitute another exception to the principle of federal pre-emption, since it does not mean that state courts may apply state law in such actions. This Court had previously held that federal law, derived from the federal labor policy, is applicable in actions to enforce collective bargaining agreements, whether such actions are brought in state or federal court. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). The sole question in *Smith*, therefore, was not whether federal or state law was applicable, but whether Congress intended to deprive the courts of jurisdiction to remedy a breach of a collective bargaining agreement which also might be an unfair labor practice. This Court, relying on the fact that Congress specifically gave the courts jurisdiction to enforce collective agreements, held that Congress did not so intend. Thus *Smith* involved simply the accommodation of two principles of federal law, not an accommodation between state and federal law. Accordingly, it has no bearing on this case.

of federal pre-emption. We will deal with each of these issues in turn.

## I. THE CONDUCT WHICH THE OHIO COURTS FOUND TO BE TORTIOUS UNDER STATE LAW IS REGULATED BY THE NATIONAL LABOR RELATIONS ACT AND IS SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NLRB

Plaintiff's case claimed that the union had forced his employer to discharge him, and other employers not to hire him, because he had violated the union's rule against assisting boilermakers. If true, the action complained of was concerted action by the union (and its members) to preserve jobs for the union members by obtaining the removal of a man whose conduct threatened those jobs. Whether this gave rise to a cause of action was, in the view of the Ohio courts, a question to be decided in accordance with common law tort rules. They treated the union's conduct as a tortious conspiracy to deprive plaintiff of his right to earn a living.

Congress, however, long ago decided that the common law was ill-equipped to deal with the problems of modern industrial relations. It enacted a statute to govern labor relations in industries affecting commerce and established the National Labor Relations Board as the agency with exclusive primary jurisdiction to enforce that statute and to make the initial judgments under it.

The question in this case, as in any other pre-emption case, is whether the conduct involved is the kind of conduct which Congress intended to be governed by its labor relations statute or is, on the other hand, the kind of conduct which Congress intended to be left to the states to govern. As phrased by this Court, the question is whether the conduct is arguably either protected by Section 7 of the Act or prohibited by Section 8. This formulation is really simply a way of asking whether, in deciding a particular case, the balancing of interests which every legal judgment entails is

to be made using the values, and the procedural rules, prescribed in the National Labor Relations Act or by using the values, and the procedural rules, of the general state law. The issue, in short, is whether Congress intended the standards established by the Act to apply to the kind of conduct involved in the case. If it did, then state actions is prohibited.

Decision on the merits in this case necessarily requires exactly the kind of balancing of interests which Congress has confided to the National Labor Relations Board, and which cannot therefore be made by the states. The action by the union of which plaintiff complains was action designed to preserve jobs for members of the union by securing the removal of a man who was taking those jobs away. This objective was accomplished by a concerted refusal to work and was therefore at least arguably protected activity under Section 7 of the Act unless it fell within those categories of concerted activity which Congress prohibited in Section 8.

Section 7 of the Act, in very broad language, protects the right of employees to organize, to bargain collectively, and to engage in concerted activities for their "mutual aid or protection." Section 8(b) of the Act specifically prohibits certain types of union activities which adversely affect employees. In order to decide in which category the union's conduct here falls, certain difficult questions under the Act would have to be decided.

It is not necessary, or even proper, for this Court to decide how this case might have been resolved by the NLRB. Indeed, it is impossible for this Court to do so, since there is no way of knowing what facts the Board would have found. It cannot be assumed—particularly on the record in this case—that the Board would even have found that the plaintiff's loss of employment was in any way attributable to any action of the union. All that we must show is that decision would necessarily involve the application of stand-

ards which the Board has been charged with applying. As a way of making that showing, we will demonstrate that what the union was alleged to have done in this case would probably have been found to be an unfair labor practice.

### A. *The Arguable 8(b)(2) Violation*

Prior to his discharge, the plaintiff had worked either as a "superintendent" or a "foreman." He claimed that the union had prevented him from obtaining employment in either capacity. The first question which the NLRB would have to resolve is whether the work which plaintiff lost included work as an "employee" as defined in Section 2(3) of the Act or was solely work as a "supervisor" as defined in Section 2(11).

Assuming that the work involved was work as an "employee," the union's alleged effort to prevent plaintiff from keeping or obtaining employment in that capacity because of his violation of a union rule would be a clear violation of Section 8(b)(2) of the Act. It is an unfair labor practice under that Section for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)," which in turn makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . ."

In *Radio Officers* v. *NLRB,* 347 U. S. 17 (1954), this Court held that it is a violation of Section 8(b)(2) to induce an employer to deny employment to a man because he had disobeyed a union rule, even though he had not actually lost his union membership, since the purpose of such discrimination was to encourage members to perform the obligations or supposed obligations of membership." *Id.* at 52. The Court reasoned:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to free-

> ly exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Id.* at 40

Of course, Section 8(b)(2) would not be applicable if we assume that neither a foreman nor a superintendent is an "employee" within the meaning of the Act. It is fairly clear from the record that a "superintendent" is a supervisor within the meaning of Section 2(11). It is probable, however, that a "foreman," as the term is used in the context of this case, is an employee within the meaning of Section 2(3).

The record shows that foremen were treated, both by the union and by the employers, as employees. They were covered by the collective bargaining agreement (R. 141), they were required to be members of the union (R. 50), they were often chosen on an *ad hoc* basis from among the members of the crew (R. 141-42), and they were permitted to perform the work of the trade along with the crew (R. 111). None of these things were true of superintendents.

The only duty performed by a foreman which could in any sense be regarded as supervisory was to transmit to his crew the instructions of the job superintendent. The authority to direct employees, however, is not in itself sufficient to make one a supervisor under Section 2(11), if such authority is "merely routine" in nature, and does not require "the use of independent judgment." The routine nature of the foremen's responsibilities is indicated by the fact that they were commonly called "pushers" (R. 110, 127), and apparently did not initiate orders themselves. They appear to have been, in short, what are commonly called "strawbosses" or "group leaders," whom the Board has held to be employees rather than supervisors:

> "The Board has had frequent occasion to distinguish between strawbosses or group leaders on the one hand and supervisors on the other, and has found that the

fact that strawbosses or group leaders are more experienced, receive slightly higher pay, and transmit routine instructions does not convert their status from employees to supervisors." *New York Shipping Assn.* 116 N.L.R.B. 1183, 1187 (1956)[3]

This question, of course, is not one which the Court must, or even should, decide. Even if the issue of whether the union's conduct constituted an unfair labor practice turned on whether plaintiff was a "supervisor" or an "employee," the fact that he was arguably an "employee" would be sufficient to pre-empt state court jurisdiction. See *Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962). And in this case, as we shall see, the question of whether plaintiff was an employee or a supervisor is not determinative of *whether* an arguable unfair labor practice was committed, but only of the kind of unfair labor practice involved.

### B. *The Arguable 8(b)(1)(A) Violation*

Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of the rights guaranteed in Section 7. As we have seen, those rights include the right to organize, to bargain collectively, to engage in concerted activity, "or to refrain from any or all of such activities." The Board and the courts of appeals have held, in a long line of cases, that an employer who discharges a supervisor because of his refusal to participate, or to participate with sufficient vigor, in an antiunion campaign coerces employees in the exercise of their Section 7 rights, because the effect of such conduct is "to cause nonsupervisory employees reasonably to fear that the Respond-

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[3] See also *International Brotherhood of Boilermakers*, 119 N.L.R.B. 1605 (1958), *enforced*, 259 F. 2d 957 (D. C. Cir. 1958); *Lancaster Welded Products, Inc.*, 130 N.L.R.B. 1478, 1480 (1961); *Freeman Loader Corp.*, 127 N.L.R.B. 514, 516 (1960); S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).

ent would take similar action against them if they continued to support the Union." *Talladega Cotton Factory, Inc.*, 106 N.L.R.B. 295, 297 (1953), *enforced*, 213 F. 2d 209 (5th Cir. 1954). See also *General Engineering, Inc.*, 131 N.L.R.B. 648 (1961), *enforcement denied on other grounds*, 311 F. 2d 570 (9th Cir. 1962); *NLRB* v. *Brookside Industries, Inc.*, 51 L.R.R.M. 2148 (4th Cir. 1962); *NLRB* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (5th Cir. 1957), *cert. denied*, 355 U. S. 864 (1957). While the Board appears never to have been faced with the converse situation —discharge of a supervisor because he is not sufficiently pro-union, or because he refuses to comply with a union rule—the same reasoning would seem to be applicable. Surely, the discharge of the plaintiff for his violation of the union's rule against assisting boilermakers would lead non-supervisory employees reasonably to believe that they would meet the same fate if they were to violate that rule. Accordingly, it is at least arguable that when a union obtains the discharge of a supervisor in circumstances such as are alleged to have been involved here, the effect is to coerce employees in the exercise of their right "to be good, bad, or indifferent [union] members" in very much the same sense that the discharge of an employee was found to have that effect in *Radio Officers.*

Moreover, to the extent that the union interfered with plaintiff's employment as a supervisor, it arguably violated not only Section 8(b)(1)(A), but Section 8(b)(1)(B) as well.

### C. *The Arguable 8(b)(1)(B) Violation*

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." This provision was designed to permit employers to hire or fire supervisors without union interference. As stated by Senator Taft, its purpose is to prevent a union from "saying to the employer,

'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' " 2 Leg. Hist. of LMRA 1012. See also *Id.* at 1077. The Senator could not have more precisely stated the plaintiff's allegation in the present case.

In a decision which was affirmed by an equally divided Supreme Court, the Board and the First Circuit have even held it to be a violation of Section 8(b)(1)(B) for a union to demand from an employer an agreement that all supervisors must be union members, even though the union was willing to agree not to "discipline the foreman for carrying out written instructions of" the employer. *International Typographical Union,* 123 N.L.R.B. 806 (1959), *enforced,* 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided Court,* 365 U. S. 705 (1961). The Court of Appeals held:

> "There can be no doubt that the foreman's duties necessarily included participation in the adjustment of grievances. Hence, by insisting that the foremen must be union members, the unions were restraining and coercing the employers in the selection of their representatives for grievance adjustment purposes. Not only would the clause as proposed by the unions limit the employers' choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union." 278 F. 2d at 12

If it is a violation of Section 8(b)(1)(B) to demand an agreement which would give the union the "power to force the discharge or demotion of a foreman" even though that power is combined with a pledge that it will not be used to frustrate the orders of the employer, it is *a fortiori* a violation for the union in fact to force the discharge of a supervisor, particularly where the reason for the union's action is that the supervisor, in the performance of his duties, violated a union rule.

In short, the present case falls squarely within the scope of the National Labor Relations Act. It involves precisely the kind of conduct which Congress has regulated as part of its comprehensive regulation of labor relations. What the union is alleged to have done in this case is plainly either protected by Section 7 or prohibited by Section 8. The decision as to whether it is protected or prohibited must be made by the NLRB, in accordance with the rules laid down by Congress. It cannot be made by a state court in accordance with the common law of torts.

## II. NO EXCEPTIONAL CIRCUMSTANCES EXIST IN THIS CASE WHICH WOULD JUSTIFY DEPARTURE FROM THE PRINCIPLE OF FEDERAL PREEMPTION

We have seen that the decisions of this Court make clear that state courts may not ordinarily regulate conduct which is regulated by the National Labor Relations Act. We have also seen that the conduct of the union which was the basis of the plaintiff's cause of action in this case is the type of conduct which the Act regulates. However, this does not quite complete the syllogism. It is still necessary to determine whether any sound basis exists for excluding this case, or cases of this nature, from the operation of the ordinary rules of pre-emption.

The exception which this Court has recognized in cases involving physical violence is, of course, not applicable here, since violence is totally absent from this case. Nor is the exception recognized in *International Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (1958) applicable. That case involved a suit brought under state law "for restoration of [plaintiff's] membership in the unions and for damages due to his illegal expulsion." *Id.* at 618. The state court had found that the plaintiff was unlawfully expelled from membership, and had entered a decree ordering his reinstate-

ment and awarding him damages. The question presented in this Court was whether the state court had jurisdiction to include in the relief damages attributable to the loss of employment opportunity which was found to have resulted from the wrongful expulsion from membership.

This Court, relying principally on the fact that the National Labor Relations Act expressly disavows any intention to regulate the internal affairs of unions, held that such matters are properly within the regulatory power of the states. It then went on to hold that, since plaintiff's cause of action was properly within the jurisdiction of the state court, it would "mutilate the comprehensive relief of equity" and produce "an incongruous adjustment of federal-state relations" to hold that the state court could not award consequential damages, arising from the loss of employment caused by the loss of union membership.

The basis of the *Gonzales* decision, in short, was that "the crux of the claim" which was there involved was wrongful expulsion from union membership, a matter not regulated —and therefore not pre-empted—by the Act. In this case, the "crux of the claim" was wrongful interference with plaintiff's employment, a matter which, as we have seen, is very much regulated by the Act. As the Ohio Supreme Court itself recognized:

> "Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. He is not asking for equitable relief. He is alleging that the union to which he belonged and certain named officials thereof committed a common law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment with the William B. Pollock Company, for which he asks money judgments" (R. 9).

Thus, whatever the vitality of the *Gonzales* decision, it is not relevant to this case.[4]

Respondent has suggested, in his brief in opposition to the petition for certiorari, that perhaps the pre-emption principle ought not to apply at all to suits by individuals against their unions, that the principal purpose of the Act was to regulate relations between unions and employers, and that such "highly individual" problems as that involved here were not "of substantial regulative concern to the framers of the N.L.R.A." The notion that only important federal laws are the supreme law of the land, and that state courts are free to ignore unimportant ones, is not one which we can find in the Constitution or in any decision of this Court. But in any event, there is simply no evidence that Congress considered the portions of the Act governing the relations between unions and employees or between unions and supervisors any less important than those governing the relations between unions and employers, or between employers and employees.

The very heart of the federal labor policy has always been Section 7 of the Act. Prior to 1947, that Section protected only the right of employees to organize, bargain collectively, and engage in concerted activities. In 1947, Congress

[4] There is, in fact, substantial basis for doubt as to whether *Gonzales* can logically survive this Court's subsequent decision in *Garmon*. One reason relied upon in *Gonzales* for not requiring the plaintiff to go to the NLRB to remedy his loss of employment was that the Board could grant only "partial relief" in the form of back pay, and could not "mulct in damages for mental or physical suffering." In *Garmon* this Court recognized that "since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." 359 U. S. at 247. Thus, the difference between the state remedy and the federal remedy for loss of employment resulting from wrongful expulsion from union membership now appears to be a ground for precluding, rather than allowing, application of the state remedy, even where the "crux" of the action is loss of membership rights. In the light of *Garmon*, this may be a proper, rather than an "incongruous," adjustment of state and federal law.

amended Section 7 to provide that employees shall also have the right "to refrain from any or all of such activities." To implement this amendment; it enacted Sections 8(b)(1)(A) and (2), which have been discussed above, and which deal solely with the relations between unions and employees. It also amended Section 8(a)(3), to prohibit the "closed shop" and sharply restrict the "union shop" by prohibiting the discharge of employees who have lost their union membership for any reason other than non-payment of dues. Nowhere in the language of the statute or its legislative history is there any suggestion that these portions are any less important than any other.

The provisions of the 1947 amendments which put supervisors beyond the reach and control of unions were also regarded by Congress as of central importance to the overall labor policy. See S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947).

We come, then, to the ultimate question on which we believe this case must turn: does the exercise of state jurisdiction in cases such as this tend to frustrate the purposes which the federal act was intended to achieve? Obviously, the answer is yes.

The federal statute was intended to provide a single, uniform body of federal law governing labor relations in industries affecting interstate commerce. As we have seen, that statute strikes a delicate balance between the right of employees to engage in collective action for their mutual aid and protection and the right of individuals to be free of union interference with their employment. The application of state law, which is based on rules and policies quite different than those embodied in the federal statute, necessarily frustrates the federal regulatory scheme.

To assure competent and consistent administration of the federal labor policy, Congress established an administrative agency, with exclusive primary jurisdiction to enforce the Act and to fashion remedies for unfair labor practices which would effectuate federal labor policy. "One of the purposes

which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *NLRB,* 324 U. S. 793, 800 (1945). Since the factual issues in this case were resolved by a lay jury, this Congressional purpose was also frustrated.

The federal statute was intended to provide appellate review of findings of fact, which findings are to be set aside if they are not supported "by substantial evidence on the record considered as a whole." § 10(f), 29 U. S. C. § 160(f). In this case, the Ohio courts applied their own standard of review, which precludes reversal of the jury verdict unless there is "no evidence" to support it.

No case could illustrate better than this one does the principle recognized in all the pre-emption cases and most succinctly articulated in *Garmon:* "Administration is more than a means of regulation; administration is regulation." For although the conduct which the state court held to be tortious in this case would probably also have been unlawful under the Act, we believe this Court, upon examination of the record in this case, will be forced to conclude, with us, that the NLRB would never have found a violation in this case, and if it had, the finding would have been set aside on review. This is apparent from the opinion of the Ohio Court of Appeals. That opinion recited that plaintiff was about 68 at the time this case arose, was receiving social security, and had been able to secure work which always terminated before he earned the $1,200 in any year which would disqualify him. It also noted that he had the habit of advising prospective employers that his "foremen's rights" had been suspended, and that only one contractor (out of nine who testified) indicated he had ever contacted the Union on this question. It concluded that "there is very little that supports he cause sued on here" but that it could

not say that there was absolutely no evidence to support the judgment. This would seem to imply quite clearly that the court would have reversed the judgment had it been permitted, by Ohio law, to apply the "substantial evidence" test.

A state court judgment for damages which is based on a finding that a union committed what amounts to an unfair labor practice can be just as destructive of the purposes of the Act as a state court judgment for damages against a union for engaging in an activity which is protected under the Act, if on the same evidence the Board would not have found a violation, or would have applied a different remedy. In this case, it is particularly unlikely that the result which was reached in the state court would have been reached before the NLRB. But in the final analysis there is only one way to assure that federal labor policy will be implemented, and that is to enforce the statute which Congress enacted for that purpose, and which gives the NLRB exclusive jurisdiction over conduct which is governed by Sections 7 and 8 of the National Labor Relations Act.

## CONCLUSION

For the reasons stated, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

NO. 482

LOCAL NO. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, ET AL., *Petitioners*.

*v.*

JACOB PERKO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

NO. 541

LOCAL 100 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES, *Petitioner*

*v.*

H. N. BORDEN

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

## MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in support of the petitioners in No. 482 and No. 541, as provided for

in Rule 42 of the Rules of this Court. The consent of the attorneys for the petitioners in both cases has been obtained. The consent of the attorneys for the respondents in both cases was requested but refused.

The AFL-CIO, a federation of national and international unions having approximately thirteen million members, is the principal spokesman for organized working people in this country. Among its affiliates are the two international unions to which the local union petitioners in No. 482 and No. 541 belong. The Federation regards the positions of the petitioners in both cases as plainly right under well-accepted and controlling decisions of this Court. Ordinarily we would feel there was no need for an *amicus* presentation in such a situation. In this instance, however, we wish to suggest to the Court that it reexamine certain prior precedent and base its reversals of the judgments below on a more comprehensive and realistic rationale than may be possible while that precedent still stands.

The union petitioners will of course emphasize that their cases can easily be disposed of in accordance with existing authority. While petitioners are correct, nevertheless in our view this Court can contribute greatly to the vitality of national labor policy by taking a broader approach. Instead of relying on the distinction between *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, which covers both of the present cases, and *Machinists* v. *Gonzales*, 356 U.S. 617, which is totally inapposite here, the Court should eliminate the need to distinguish, by repudiating *Gonzales*. As we propose to show, *Gonzales* has served to confuse most of the lower courts and to encourage some of them to subvert basic federal objectives by regulating labor-management relations under the guise, for example, of redressing wrongs done union members within their organizations. *Gonzales* is at odds with the main-

stream of current preemption theory and with the practical requirements of uniform national labor policy. We feel that an *amicus* presentation by the AFL-CIO will assist the Court in assessing the need to reevaluate *Gonzales* and in fashioning a more adequate formulation of the preemption rule.

Respectfully submitted,

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March 1963

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

NO. 482

LOCAL NO. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, ET AL., *Petitioners*

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*v.*

H. N. BORDEN

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

### INTEREST OF THE AFL-CIO

This brief *amicus curiae* is tendered for filing by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's

granting the Motion for Leave to File a Brief as Amicus Curiae.

The AFL-CIO is primarily a federation of national and international unions which have a total membership of approximately thirteen million. The AFL-CIO regards the two state court decisions being reviewed in No. 482 and No. 541 as plainly wrong under existing precedents of this Court, and ordinarily in such a situation the Federation would consider an *amicus* brief by it superfluous. In the present instance, however, we wish to urge the Court to use this opportunity to reexamine certain prior precedent, to repudiate it, and to ground its reversals of the judgments below on a broader and more realistic basis than may be possible while that precedent remains as authority.

The union petitioners will naturally concentrate on the facts and law of their particular cases. But the two cases before the Court are not important merely because they represent an erroneous interpretation by state courts of this Court's leading decisions on the perennial themes of federal preemption and the exclusive primary jurisdiction of the National Labor Relations Board. The instant cases are also important because they are symptoms of a marked deformity in the law of preemption itself. *Machinists* v. *Gonzales*, 356 U.S. 617,[a] simply does not fit with what preceded it and what followed it. It has proven, in actual practice, to be a source of confusion to state courts over the proper limits of their authority, a ready instrument whereby artful pleaders can circumvent the exclusive juris-

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[a] In singling out *Gonzales* for criticism, we do not mean to indicate approval of the holding in its companion case, *Automobile Workers* v. *Russell*, 356 U.S. 634. To the extent that state court *jurisdiction* in *Russell* is now attributable to the presence of "violence and imminent threats to the public order," see *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247, the decision

diction of the federal Board through a slight shift in the wording of their prayers for state court relief, and an open invitation to hostile or unknowing judges and juries to regulate labor-management relations under the guise, for example, of redressing wrongs done union members within their organizations. As the principal spokesman for organized working people, the AFL-CIO therefore has a direct interest not only in securing reversals in the present cases, but also in rooting out an underlying cause of the errors.

## ARGUMENT

### I. Under This Court's Applicable Decisions, Courts Have No Jurisdiction Over Actions By Employees For Loss Of Employment Resulting From Nonviolent Conduct Arguably Subject To The National Labor Relations Act.

Petitioners in *Iron Workers Local 207* v. *Perko*, No. 482, and *Plumbers Local 100* v. *Borden*, No. 541, have thoroughly demonstrated that the judgments below in both cases should be reversed because they are in conflict with the applicable decisions of this Court. We do not wish to burden the Court with a repetition of petitioners' arguments. But since we intend to devote the major portion of this *amicus* presentation to suggesting that the reversals should be placed on broader grounds than existing precedent may allow, and that these cases should be used as vehicles for reexamining *Machinists* v. *Gonzales*, 356 U.S.

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may be supportable. To the extent that *Russell* upheld an award for lost wages and punitive damages to an employee kept from work by a strike and picketing, the decision is subject to much the same objections as *Gonzales*. We focus on the latter because it is more expansive in theory and more troublesome in practice. But our comments will often apply to both.

617, as well as certain aspects of *Automobile Workers* v. *Russell*, 356 U.S. 634, we should first like to make it clear that we are advocating this course because we think it highly desirable, not because we think it necessary in order to sustain petitioners' positions in the instant cases.

In *Perko* the union allegedly forced respondent's employer to discharge him, and kept respondent from securing further employment, because he had violated a union rule against imparting the skills of his craft to the members of another union (R. 2, 183).[3] In *Borden* respondent transferred from one local to a sister local, and the latter then allegedly refused to refer him to a job through its hiring hall (R. 11-13, 23-24, 349-350). In each case the union contested the jurisdiction of the state court on the ground the subject matter of the action was within the exclusive jurisdiction of the National Labor Relations Board (R.[*Perko*] 9, 12; R.[*Borden*] 6, 25, 350).

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[3] The union may have prevented the respondent from being employed in a supevisory status, so that he would not have been entitled to the protections afforded an "employee" by the federal Act. We agree with petitioners that the classification of respondent as an employee or as a supervisor should be a matter for the Labor Board in the first instance. But even if respondent is considered a supervisor, this would merely transform the union's arguable unfair labor practice from an 8(b)(2) (causing employer discrimination against employees to encourage union membership) into an 8(b)(1)(B) (coercing employers in the selection of their bargaining representatives), see *NLRB* v. *Teamsters Local 294*, 284 F. 2d 893 (2d Cir. 1960); *cf. Typographical Union* v. *NLRB*, 278 F. 2d 6 (1st Cir. 1960), *aff'd. by equally divided Court*, 365 U.S. 705, or an 8(b)(1)(A) (coercing employees in the rights guaranteed them under sec. 7), *cf. NLRB* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (5th Cir. 1957), *cert. den.* 355 U.S. 864 (employer coerced non-supervisory employees by discharging supervisor for testifying under the Act). In either event Board jurisdiction would be exclusive.

We start with the proposition that "[w]hen an activity is arguably subject to §7 or §8" of the National Labor Relations Act, the courts "must defer to the exclusive competence" of the NLRB. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245. See also *Garner* v. *Teamsters Local 776*, 346 U.S. 485; *Weber* v. *Anheuser-Busch*, 348 U.S. 468. Job discrimination to encourage unionism by compelling adherence to a union's institutional rules is at least arguably an unfair labor practice under section 8 of the Act, as is union-inspired discrimination in the referral of job applicants from an exclusive hiring hall. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17; *cf. Carpenters Local 60* v. *NLRB*, 365 U.S. 651; *Teamsters Local 357* v. *NLRB*, 365 U.S. 667. Absent some special factor, therefore, the courts are obviously ousted of jurisdiction to entertain actions like those involved here.

Preemption admits of two exceptions. Despite the presence of activities potentially subject to the NLRA, states retain the power to regulate as a matter of their own state law[3] (1) conduct of "merely peripheral concern" to the federal Act, and (2) conduct "marked by violence and imminent threats to the public order." *Garmon*, 359 U.S. at 243-44, 247, citing *Gonzales* for the first exception and

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[3] In addition, the doctrine of primary jurisdiction does not apply to prevent a state court from assuming jurisdiction over a suit under sec. 301 of the Taft-Hartley Act on a contract between an employer and a union, even though an unfair labor practice is also involved; however, the law to be applied in such a case is not state law but federal law. *Smith* v. *Evening News Assn.*, 371 U.S. 195; see also *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502; *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95; *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238. This line of decisions gives respondents no comfort. The suits here are between individuals and labor organizations, and are grounded on state substantive law, not on any collective bargaining agreement.

*Russell* and *Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, for the second. No one suggests that violence is any part of either of the instant cases. Nor is the *Gonzales* exception applicable.

In *Gonzales* the "crux of the claim," as revealed by the pleadings, was an individual's expulsion from a labor organization in alleged violation of his contract of membership. 356 U.S. at 618. This wrong would have been totally beyond the jurisdiction and remedial powers of the NLRB, and the union did not contest the power of the state courts to order reinstatement. *Id.* at 619. In both cases presently before the Court, on the other hand, the crux of the claims was the loss of employment because of union discrimination or coercion. And that is of the very stuff of Board jurisdiction. In *Perko* the respondent made no claim whatsoever on the basis of lost membership rights (R. 9). In *Borden* the respondent did make an allegation that he was for a time denied transfer into one local from a sister local, but the jury found to the contrary (R. 2, 12, 63). So respondents can rely upon neither the "violence" exception nor the *Gonzales*[*] exception to the preemption doctrine in attempting to sustain the jurisdiction or remedial power of the state courts.

We leave it to petitioners to dispose of the various other subsidiary grounds which have been advanced for upholding state jurisdiction in these cases. Their flavor is suggested by the contention of the Texas Court of Civil

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[*] In *Gonzales*, furthermore, the union's pleadings "challenged the jurisdiction of the [state] court, but said nothing about unfair labor practices." 356 U.S. at 622, n.1. In contrast, the pleadings of petitioners here expressly pointed out the applicability of protections or prohibitions of the NLRA (R. [*Perko*] 12; [*Borden*] 6).

Appeals in *Borden* that there could have been no discrimination to encourage union membership in violation of sections 8(a)(3) and 8(b)(2) because "plaintiff was already a member" (R.351). That argument was laid to rest by this Court as long ago as *Radio Officers*, 347 U.S. 17.

## II. Courts Should Not Have The Power To Supply A Remedy For Nonviolent Conduct Arguably Subject To The National Labor Relations Act, Regardless Of Their Jurisdiction Over The Basic Cause Of Action.

### A. State Court Applications and Misapplications of Gonzales

As we have demonstrated, the decisions below are plainly wrong because they sustain state court jurisdiction over conduct arguably subject to the exclusive jurisdiction of the NLRB, in direct conflict with the *Garmon* holding. Each case is clearly distinguishable from the situation in *Gonzales* or *Russell*, where a state court assumed jurisdiction over conduct subject to state control and then, in the course of adjudicating the issues properly before it, supplied a remedy which reached conduct subject to the federal Act. Although the present cases can thus easily be disposed of on the narrow ground that they fall within the *Garmon* rather than the *Gonzales* pattern, in our view the Court should use this opportunity to reexamine the validity of the *Gonzales* distinction itself, and should base its decisions on a more comprehensive and realistic rationale than may be possible while the *Gonzales-Russell* precedents still stand.

The courts below in both of the pending cases cited *Gonzales* in support of their assertion of jurisdiction. This is customary whenever an individual seeks a judicial remedy against a labor organization for alleged interference with his job rights, regardless of the precise nature of his

cause of action. What proposition *Gonzales* may be cited for in any given opinion seems to be as much a function of geography as of legal analysis. We have, however, attempted to make some reasonable classification of a cross-section of the reported decisions.

Distressingly, but significantly, the largest number of opinions seem unable to articulate exactly what they think *Gonzales* means, especially in light of the subsequent *Garmon* decision; the natural tendency in such a situation is for a court to uphold its own jurisdiction. Another set of decisions applies *Gonzales* with literal correctness but incongruous results. The most thought-provoking approach is one which, while still ill-defined and at odds with existing precedent, indicates how *Gonzales* could logically be extended to undermine almost the entire doctrine of federal preemption and primary jurisdiction. Finally, and we hope prophetically, one line of cases suggests that *Gonzales* has effectively been overruled by *Garmon*. We shall deal in turn with each of these categories.

1. The courts of such states as Ohio, Oklahoma, North Carolina, Kansas and Idaho quite simply do not understand *Gonzales*. Essentially, they think it authorizes state court jurisdiction whenever a cause of action can be characterized as a tortious invasion of a property right, or a breach of contract, or can otherwise be tagged with a label derived from the common law, even though the alleged wrong is also an unfair labor practice. Thus, in *Perko*, the Supreme Court of Ohio cited *Gonzales* and *Russell* for the proposition: "The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction" (R. 9-

10). See also *Pierce* v. *Otis Elevator Co.*, 331 P. 2d 481 (Okla. 1958) ("blacklisting" of employee by union and employer); *Willard* v. *Huffman*, 250 No. Car. 396, 109 S.E. 2d 233 (1959), *cert. den.* 361 U.S. 893 (employee discharged for union activities); *Taylor* v. *Operating Engineers Local 101*, 189 Kan. 137, 368 P. 2d 8 (1962) (union interference with employee's contract of employment). Even where *Gonzales* might possibly have been correctly applied, as in *Lockridge* v. *Motor Coach Employees*, 369 P. 2d 1006, 1010 (Ida. 1962) (union member sued for damages resulting from allegedly wrongful suspension), a court may be able to do no better in rationalizing the controlling decisions than to say: "In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case . . ."

2. The New York courts seem to have followed *Gonzales* with literal exactitude and in so doing have only succeeded in emphasizing its defects. In *Green* v. *Folks*, 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961), the court dismissed an employee's action against his employer and union to recover damages for an allegedly unlawful discharge stemming from an invalid suspension from the union. The employee then turned around and sued the union on a theory of wrongful suspension, seeking reinstatement to membership and consequential damages for loss of wages. Citing *Gonzales*, the court accepted jurisdiction over this more artfully pleaded second action. 223 N.Y.S. 2d 287 (N.Y. Cty. 1961). Yet the major change in the substance of the suit was the dropping of the employer as a defendant.

3. In upholding state jurisdiction in *Borden* below, the Texas Court of Civil Appeals relied on *Gonzales* to support the view that the federal Act "does not displace state court jurisdiction over suits to determine and enforce rights of union members in their union" (R. 351). As we have previ-

ously indicated,[5] this is not a fair construction of the pleadings in *Borden*. The pleadings here are still in no better posture than those in the first round of the New York litigation in *Green* v. *Folks*, just discussed; the crux of the action is the loss of job rights, not the loss of union membership rights. Yet it must be conceded there is a certain perverse logic in the implications of the Texas opinion. Unless *Gonzales* is rigorously limited to its precise facts,[6] why could not a union member sue his organization for breach of an "implied promise" of equal treatment in his contract of membership, and then recover consequential damages for discrimination in job referrals or other employment rights?[7] The realistic answer, of course, is that we cannot afford to jeopardize national labor policy by allowing state courts to immunize themselves from the preemption doctrine by the simple process of reading into union constitutions, as a matter of state contract law,[8] what-

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[5] See part I *supra*, p. 6.

[6] See note 4 *supra*. But suggesting that *Gonzales* might be followed as long as the talismanic words, "sec. 7," "sec. 8" or "unfair labor practice," do not appear in the union's answer, places entirely too high a premium, we feel, on skillful pleading. In addition, of course, *Gonzales* dealt with an expelled member's suit for reinstatement, not with a member's suit for enforcement of other intraunion rights. It may be difficult in theory, however, to make this a decisive distinction.

[7] Paragraph XIII of the original petition and paragraph XV of the first amended original petition in *Borden* contained allegations of just such breaches of an "implied promise" in the contract of membership (R. 4, 14). Respondent's pleading error was his failure to make these alleged breaches the "crux" of his action. Surely the vitality of uniform national labor policy cannot be allowed to hinge on these vagaries.

[8] The potential applicability of state substantive law is enough in itself to make the situation entirely different from cases of suits under sec. 301 of the Taft-Hartley Act, where federal law is ap-

ever "implied promises" happen to suit their purposes. *Gonzales* must be reexamined, and its implications, at least, repudiated.

4. Pennsylvania regards *Gonzales* as being effectively overruled by *Garmon*. See *Wax* v. *Mailers Union*, 400 Pa. 173, 161 A. 2d 603 (1960). That view may not be in accordance with the literal language of the *Garmon* opinion. But it is wholly justified by the practical necessity, as recognized by this Court in its decisions from *Garner* through *Garmon*, of strictly limiting the exercise of state jurisdiction in the field of labor relations in order to ensure the effectiveness of uniform national policy.

This mass of conflicting state court interpretations of *Gonzales* underscores the need to reevaluate the premises and implications of that decision, and to extirpate its potential for thwarting basic federal labor objectives.

B. The Fallacies of Gonzales

In *Gonzales* an individual sued a union for reinstatement on the ground he had been expelled in violation of his membership contract, and this Court upheld the power of a state court to include in the remedy an award of damages for lost wages and mental suffering resulting from the breach of contract. 356 U.S. at 620-21. Professor Michael Sovern of Columbia observes that three arguments were given to support this result, and concludes as to two that "neither of them will withstand analysis."* We agree with the

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plicable and this Court has the power of full review. See note 3 *supra* and note 12 *infra*.

*Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 Harv. L. Rev. 529, 555 (1963). Numerous other commentators, including some sympathetic to the result, have characterized *Gonzales* as being out of harmony with the general tenor of this Court's preemption decisions. See, *e.g.*, Meltzer, "The Supreme

quoted judgment. It was suggested in *Gonzales* that the "evidentiary coincidence" between the facts needed there to support a breach of contract and the facts needed in a "plausible proceeding" before the NLRB did not require displacement of state court jurisdiction, any more than did the "argumentative coincidence" of facts in the tort action in *Laburnum*. 356 U.S. at 621. That rationale, insofar as it likened *Gonzales* to a tort suit, was expunged by *Garmon;* state jurisdiction is preempted where the conduct is "arguably subject" to the NLRA. 359 U.S. at 245. It was further suggested in *Gonzales* that the award of damages presented no greater risk of conflict with the Board than the reinstatement to membership. 356 U.S. at 621. But as Sovern says: "This simply is not true. * * * the award of damages is based on the resolution of issues that are central to the NLRA." [10]

This leaves one remaining ground for *Gonzales*. Once having acquired jurisdiction over the reinstatement suit, it was reasoned, the state court should have the power to "fill out" the remedy by awarding damages for the consequential loss of wages and mental suffering; there was no need to "mutilate the comprehensive relief of equity" by requiring an employee to go to the courts for his lost membership and to the Labor Board for his lost wages. 356 U.S. at 621. That rationale, too, we submit, is demonstrably unsound. As a matter of legal theory, it is premised on a concept of preemption whose validity was assumed by a

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Court, Congress, and State Jurisdiction over Labor Relations," 59 Col. L. Rev. 6, 44 (1959); Schwartz, "The Supreme Court—October 1957 Term," 57 Mich. L. Rev. 315, 332 (1959); Hanslowe, "Labor Relations Law," 36 N.Y. Univ. L. Rev. 1446, 1448 (1961) ("[t]he distinction [between *Garmon* and *Gonzales* situations] is not always easily drawn and may, in this sort of case, depend more upon the semantics of pleading than upon substance").

[10] Sovern, *supra* note 9, 76 Harv. L. Rev. at 555-56, n. 80.

majority of the Court at the time of *Gonzales*, but which was ultimately rejected in *Garmon*. And as a matter of labor policy, it represents a balancing of the undesirability of fragmented remedies against the undesirability of overlapping or conflicting remedies, with the erroneous practical judgment being made that the latter was the lesser evil.

When *Gonzales* was decided the prevailing view of this Court was that the application of the preemption principle turned on the existence of a possible "conflict" of "remedies." *Laburnum*, 347 U.S. at 665; *Russell*, 356 U.S. at 644. Consequently, there was a certain appeal to the *Gonzales* argument that state court jurisdiction should be upheld where the Labor Board could not give the kind of relief or the full relief sought by a party. But with *Garmon* this concept evaporated. The experience of more than a decade of adjusting federal-state relations in this area had taught that the crucial factor in preemption was not the remedy but the conduct remedied, "the nature of the activities which the States have sought to regulate, rather than * * * the method of regulation adopted." 359 U.S. at 243. *Gonzales* could then properly be left to stand for the proposition that the states retain the power to regulate conduct which is "a merely peripheral concern of the Labor Management Relation Act." *Ibid.*

The fault lies in the *Gonzales* application, not the *Garmon* rationalization. Union membership rights as such are indeed of only peripheral concern to the scheme of the NLRA; but concern with job discrimination aimed at encouraging or discouraging unionism is at the Act's very core. When the state court reinstated *Gonzales* to union membership it was, we will assume, validly enforcing a contract in accordance with state law. When it proceeded to award damages for lost job rights, however, it was invading a federal domain by regulating labor relations,

again in accordance with state law. To characterize what took place in any other fashion is to engage, as the Chief Justice remarked in dissenting in *Gonzales*, in "a game that is played with labels." 356 U.S. at 632.

*Gonzales* likewise finds no support in the decisions of this Court which have sustained the concurrent jurisdiction of the federal and state courts to entertain suits on collective bargaining agreements, despite the possible involvement of unfair labor practices.[11] *Gonzales* was a contract action, but the contract was between an organization and a member, to be interpreted and enforced, we gather, under state law,[12] not a contract between a union and an employer, to be interpreted and enforced under a section of the same comprehensive federal law which delineates unfair labor practices and prescribes remedies for them. Within the one federal scheme possible conflicts between decisions of the Labor Board and the courts are always subject to ultimate resolution by this Court. But once it is established that in a certain type of case the states may exercise jurisdiction and provide remedies as a matter of state law, there is little this Court can thereafter do to preserve national labor

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[11] See note 3 *supra*.

[12] In *Gonzales* this Court apparently accepted the traditional view in this country that a union constitution and bylaws are a contract between union and member, enforceable as a matter of state law. 356 U. S. at 618-19. In *Parks* v. *IBEW*, 52 LRRM 2281, 46 Lab. Cas. ¶ 18,073 (4th Cir. Jan. 23, 1963), it was held that a local union could sue its international for alleged violation of the international constitution under sec. 301, on the ground the constitution was a contract "between • • • labor organizations." Even if this is correct, it would seem a long additional jump to sustain 301 jurisdiction when an individual member sues his union, and an impossible leap when the basis of the action is the *local* constitution or bylaws.

doctrines against erosion by the shifting currents of state decisions.

That brings us to the basic policy question in *Gonzales*. Which should be given paramountcy: the employee's desire to avoid having to pursue his remedies before two tribunals (put differently, a state's interest in providing an "unmutilated" equitable remedy), or the nation's interest in promoting a uniform system of labor regulation? The question should not be answered in the abstract, as is so often attempted. Former Professor Paul R. Hays of Columbia has wisely cautioned, for example, that too much theoretical analysis could result in underestimating "the possibilities of the severe impact on labor-management relations of the decisions in the *Russell* case and, even more importantly, the *Gonzales* case." [13]

In the real world, then, the inconvenience which would be caused an employee if *Gonzales* were overruled is nowhere near as bad as it may sound when one says he would be forced to "pursue his remedies before two tribunals." So far as the federal remedy is concerned, it means he would have to walk around to the nearest NLRB regional office, or mail the office a letter, and submit his charges. From then on Board agents would take over the pursuing of his remedy. On the other hand, if the *Gonzales-Russell* doctrine is sustained and extended in accordance with its logical implications, a labor organization may be faced with a suit which is technically for breach of a membership contract, but which carries with it the very genuine possibility that the remedy provided by the state court will include an award for back pay, for punitive damages or mental suffer-

[13] Hays, "Foreword," 59 Col. L. Rev. 1, 5 (1959).

ing in an amount some twenty times the back pay,[14] and for the "foreseeable" loss of the complaining employee's earnings during the entire remainder of his life expectancy.[15] If some two or three dozen employees are involved—and intraunion litigation is likely to involve a group of disaffected members—an award in which all sorts of subsidiary damages are added to the actual loss of wages can easily mount to a total in excess of a million dollars.[16] For a local labor union that can mean obliteration.

As long as the officially declared policy of the United States includes "encouraging the practice and procedure of collective bargaining" through "representatives of [the employees'] own choosing,"[17] the awarding of such staggering sums by state courts as a remedy for conduct subject to the NLRA represents a veritable displacement of national labor policy, with the form of the action serving only as a shabby cloak over the reality underneath. Set against such a displacement of federal policy, any minor inconvenience caused an employee who may have to file charges with the NLRB as well as a suit in the courts, and any theoretical "mutilation" of a court's comprehensive equity remedy, are as nothing in the balance. We question, indeed,

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[14] See *Russell*, 356 U.S. at 652, n. 10 (judgment upheld for $10,000, of which only $500 represented lost wages); see also the listing of companion actions, *id.* at 657, n. 16.

[15] See, *e.g.*, *Casida* v. *Operating Engineers*, Civil No. 10884, D. Tex., discussed in Brandwen, "Punitive-Exemplary Damages in Labor Relations Litigation," 29 Univ. Chi. L. Rev. 460, 461, n. 8 (1962), and accompanying text.

[16] *Ibid.* In *Casida* a Texas judge and jury awarded twenty-eight employees who lost their jobs during a strike $1,265,896. See also *Russell*, 356 U.S. at 656-58 (Russell was one of thirty fellow employees who filed claims totaling $1,500,000 in the Alabama courts).

[17] NLRA §1, 49 Stat. 449, §1 (1935), as amended by 61 Stat. 136 (1947), 29 U.S.C. §151.

whether many employees concentrate on the court route because they find any real inconvenience in having to pursue their remedies before two tribunals; we suggest that the usual reason for avoiding the Labor Board, when it would have jurisdiction and could order job reinstatement and award back pay, is the simple desire to get a labor union before a judge and jury imbued with hostile regional attitudes and armed with such antiquated but formidable truncheons as the power to award "smart" money.

Viewed either theoretically or practically, therefore, the kind of award upheld in *Gonzales*, or in *Russell*, is plainly incompatible with federal labor policy and with the main body of current preemption doctrine. The formulation of a more adequate rule to cover such situations as *Gonzales* and *Russell* is in order.

C. The Proper Preemption Rule

We need not quarrel with the *Garmon* proposition that the states retain jurisdiction to deal with "violence" or with conduct of a "merely peripheral concern" to the LMRA. Nonetheless, these are the exceptions; the general rule enunciated in *Garmon* is that the courts are ousted of jurisdiction over conduct "arguably subject" to the jurisdiction of the NLRB. From *Garner* through *Garmon* the mainstream of preemption theory reflects the same underlying reason for exclusive jurisdiction—which is also the key to the solution here: "Administration is more than a means of regulation; administration is regulation. • • • To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon*, 359 U.S. at 243, 244; see also *Garner*, 346 U.S. at 490-91. It is only left for us to ask: How, *in fact*, can state law "regulate" an activity "within the central aim of federal regulation"?

In *Garmon* this Court turned its attention, we believe properly, to the nature of the activities regulated, rather than the method of regulation adopted, as the prime factor in resolving preemption problems. Yet it would be a disservice to the *Garmon* principle to allow its abstract validity to blind us to the reality earlier recognized by this Court in *Garner*: "* * * when two separate *remedies* are brought to bear on the *same activity*, a conflict is imminent." 346 U.S. at 498-99. (Emphasis added.) State law could regulate labor relations, in potential conflict with the federal scheme, if it could provide a separate remedy by awarding back pay and punitive damages to an employee who brings an action grounded on job discrimination aimed at encouraging or discouraging union adherence. As the dissenters in *Gonzales* so correctly insisted, there is in effect not the least bit less regulation of labor relations, and not the least bit less potential conflict with the federal scheme, when state law provides a separate remedy by awarding back pay and punitive damages or damages for "mental suffering" to an employee who suffers job discrimination aimed at encouraging union adherence, merely because the employee grounds his action on the loss of union membership rights. See 356 U.S. at 623-33 (dissenting opinion); *cf. Russell*, 356 U.S. at 647-59 (dissenting opinion).

In short, state law could regulate conduct "within the central aim" of national labor policy if it could provide remedies when such conduct is made the subject matter of a state court action; and state law can continue effectively to regulate conduct "within the central aim" of national labor policy as long as this Court allows a state court to provide remedies for such conduct on the theory it is providing "consequential damages" for other conduct of a merely peripheral concern to the federal scheme. To paraphrase *Garmon*, a remedy is more than a means of regu-

lation; a remedy is regulation. The fact that state remedies, such as punitive damages, will often be far more devastating in their impact on a labor organization than the remedies available through the NLRB only serves to emphasize the way a state can employ its remedial powers to effectuate its own notions of substantive labor relations policies under the guise of enforcing nonfederal rights. As the Chief Justice said in his *Russell* dissent: "The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones." 356 U.S. at 650.

The *Garmon* rule, then, should be refashioned somewhat as follows: When an activity is arguably subject to section 7 or section 8 of the federal Act, a court must defer to the exclusive competence of the NLRB to regulate such activity, except as necessary to maintain public order, not only by refusing to entertain an action based on that activity but also by refusing to provide a remedy for it even where it is related to some other conduct which is within the court's jurisdiction and which is the subject of the action.[18]

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[18] We have phrased our statement of the rule in keeping with the *Garmon* wording. It might well be, however, that the issue of federal preemption should not pivot solely on the narrow question of whether a particular activity is either protected or prohibited by the National Labor Relations Act. The majority opinion in *Garmon*, see 359 U.S. at 245, may foreshadow an acceptance by this Court of a broader preemption doctrine along the lines advocated by such scholars as former Professor Cox. For him the NLRA is a "comprehensive code of regulation" in the field of labor-management relations, effecting a "total pre-emption of state laws dealing with unionization and collective bargaining, including resort to peaceful strikes and picketing." Cox, "The Labor Decisions of the Supreme Court at the October Term 1957," *Proceedings of the ABA Section*

So stated, the principle gives full weight to the best that has been taught by the decisions from *Garner* through *Garmon*; disposes of the disharmonies of *Gonzales* and *Russell*; and leaves intact state jurisdiction to remedy violence and other conduct not central to the federal scheme. If on occasion there might be some difficulty in deciding whether a state court had in fact taken preempted conduct into account in fashioning a remedy for conduct subject to state control,[19] any such difficulty would be more than offset by the increased protection afforded national labor policy. The suggested change in the preemption rule would of course not vary the capacity of the federal and state courts to entertain suits to enforce contracts between unions and employers as a matter of federal law under section 301 of Taft-Hartley.[20]

We respectfully urge the Court to use this opportunity to reexamine *Gonzales* and *Russell*, to repudiate their dangerous rationales, and to base the decisions in the present cases on reasoning like that we have proposed.

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*of Labor Relations Law* 12, 20-21 (1958); see also "Report of the Committee on State Labor Legislation," *Proceedings of the ABA Section of Labor Relations Law* 133, 136 (1959). This Court has stated that preemption is not affected by any distinction between state laws regulating labor-management relations as such and state laws of general applicability. *Weber* v. *Anheuser-Busch*, 348 U.S. 468, 479-480. *Cf. Teamsters Local 24* v. *Oliver*, 358 U.S. 283.

[19] The dissenters in *Russell* acknowledged that a state court could award damages for "physical injuries inflicted in the course of conduct regulated under the Federal Act," but not for "economic loss sustained from conduct regulated by the Federal Act." 356 U.S. at 649, 650. In certain situations a precise dollar line between the one kind of damages and the other might be hard to draw. But it would seem no harder than determining whether any given jury verdict is "excessive."

[20] See note 3 *supra*.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the briefs for the petitioners, the judgments below in No. 482 and No. 541 should be reversed.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 482.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, *et al.*,

*Petitioners,*

vs.

JACOB PERKO,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

## BRIEF FOR RESPONDENT.

### RESTATEMENT OF QUESTION PRESENTED.

The question presented for review is as follows:

Whether the National Labor Relations Act precludes a State court from exercising jurisdiction in a tort action brought by a supervisor against the union to which he formerly belonged where he seeks damages (and not reinstatement) for an unlawful interference with his employment?

### ADDITIONAL STATUTES INVOLVED.

Section 14 of the National Labor Relations Act as amended, 29 U. S. C. Section 164(a):

> "(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer

subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Other applicable sections of the National Labor Relations Act are set forth in the Petitioners' Brief on pages 2-5.

## SUPPLEMENTAL STATEMENT OF THE CASE.

Without attempting to summarize the entire transcript of testimony presented at the second trial of this action, entitled "The Third Round" in Brief for Petitioners, certain additional portions of the testimony are pointed out to this Court.

The plaintiff, Jacob Perko, was employed as job superintendent for the William B. Pollock Company in the construction of a hot blast stove at the Ohio Works of United States Steel Corporation (R. 22-23). A job superintendent is the contractor's representative on the job, supervising the entire construction project for his employer (R. 127). As such, he gives orders and instructions to the foremen of the various crafts employed on the project (R. 22).

In December, 1953, the plaintiff claimed that his "foreman's rights" had been taken away from him by the defendant union (R. 60). "Foreman's rights" as used in the trial is the right and power to give orders covering journeyman ironworkers (R. 103). The ironworkers refused to take orders issued by plaintiff (R. 23, 24, 43, 44). The refusal to take orders from the plaintiff was observed by plaintiff's employer with the result that orders covering ironworkers had to be given to the ironworkers' foreman by a Mr. Francis N. Walsh, Field Superintendent for the William B. Pollock Company (R. 24).

Mr. Walsh was informed by the job steward that the ironworkers were not taking orders from plaintiff pursuant to orders from the union's Executive Board (R. 24). The steward said the men themselves would be fined if they followed plaintiff's orders (R. 27). The steward is the union representative on the job (R. 51).

Plaintiff attempted to remedy his difficulties with his union. He had been tried and fined for purportedly violating a union rule against assisting boilermakers (R. 54-55). Written charges of his misconduct were the basis for his being tried and fined (R. 164). He attempted to pay the fine but was informed by the union's business agent that the payment of the fine would not restore his "foreman's rights" (R. 66).

Plaintiff hired an attorney to obtain reinstatement by the union of his foreman's rights (R. 60). The attorney was ignored by the union (R. 77-78).

No explanation of its action toward plaintiff was offered at the trial court level. In fact, the union officials denied doing anything that would affect plaintiff's foreman's rights (R. 97, 109, 122, etc.) They stated that they had no right to do anything that would affect his foreman's rights (R. 56), and that their Constitution prohibited such type of conduct (R. 56).

The Record also contains evidence as to the damages suffered by plaintiff and his attempts to mitigate damages by securing other employment.

Plaintiff's employer terminated his employment since he could no longer work as job superintendent because of his dispute with the union (R. 37).

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It is interesting to note that plaintiff was charged with an offense that he committed two days *after* the charges were reduced to writing.

## ARGUMENT.

### Introduction.

Counsel for Respondent have restated the question of law presented by this appeal so that the actual question to be determined by this Court will not be obscured. There are two material factual differences in the question as restated: (1) the inclusion of the fact that plaintiff, at the time of the union's wrongful act, was employed as a "supervisor," and, (2) the omission of any motive or objective for the union's securing the discharge of plaintiff from his employment, the former being contained in the Record and the latter being noticeably absent from the Record.

With these two factual differentiations, a major portion of Petitioners' argument need not be discussed since the questions taken up by Petitioners are not presented by this appeal.

For the reasons stated above, counsel for Respondent have also supplemented Petitioners Statement of the Case by various references to the transcript of the testimony taken at the trial and contained in the Transcript of Record before this Court.

### I.

### Applicability of The National Labor Relations Act.

Section 2(3) of the National Labor Relations Act, as amended, 29 U. S. C. Section 152(3), defines the term "employee" and specifically provides that the term employee shall not include any individual employed as a supervisor. Section 2(11) of the Act, 29 U. S. C. Section 152 (11), defines the term "supervisor." The Act itself deals with "employees" and "labor organizations" and does not purport to deal with supervisors.

The Congressional purpose behind the exclusion of supervisors from the scope and operation of the Act is disclosed by the comments of Senator Taft and Senator Flanders. The reasons for removing the supervisory force from the area of collective bargaining are simple and direct. Unless the employer can hire and discharge, promote, demote, and transfer these men, he has lost the control of his business. He cannot run it effectively. 93 Cong. Rec. 4804.

Was Plaintiff a supervisor under the Act? If this question is answered in the affirmative, no further review of this action is appropriate. It must be conceded that supervisors, being excluded from the scope and operation of the Act, must turn to other tribunals such as state courts to seek protection of their property rights, including the right to employment free from unjustified interference by

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The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They must follow orders of the employer or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally required to do the basic work they performed before the passage of the Wagner Act.

It is not very difficult for management to prove, as a part of management, that it is impossible to manage a plant unless the foremen are wholly loyal to the management. We tried various intermediate steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate foremen's unions not affiliated with the main unions, but it was found that that was almost impossible, that there was always an affiliation of some sort, that foremen, in order to be successful as a "boss" must have the support of the employees above. A plant can promote other men to be foremen if necessary. The trouble with the employees is inevitable. The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States. 93 Cong. Rec. 3952.

third persons. At this point, the doctrine of pre-emption cannot with logic even be suggested since pre-emption arises from conflict. There can be no conflict with a Federal law that specifically excludes supervisors from its scope and operation.

Factually, then, was Plaintiff a supervisor under the Act when the tort was committed—when the union, without justification, interfered with his contract of employment?

> Record, pages 22, 23. Plaintiff was job superintendent at the Ohio Works (U. S. Steel Corp.) for his employer, The William B. Pollock Company.
>
> Record, page 22. A job superintendent is responsible for directing more than one craft.
>
> Record, page 127. A job superintendent is the representative of the contractor and is in charge of all the work the contractor has on the job.
>
> Record, pages 90, 91. A job superintendent is not a member of the bargaining unit, his wages not being covered in the collective bargaining agreement.
>
> Record, page 37. The Plaintiff's employment as job superintendent was terminated because he could not work as job superintendent due to his dispute with the union.

Petitioners concede that "it is fairly clear from the record that a 'superintendent' is a supervisor within the meaning of Section 2(11)" of the Act (Brief for Petitioners, page 20). The defendant union, in response to plaintiff's petition, filed an amended answer denying all the allegations in plaintiff's petition and alleging a "Sec-

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The Record also discloses that plaintiff sought work as "foreman" or "pusher" after being removed from his employment as job superintendent. This was offered only as evidence as to plaintiff's duty to mitigate damages. In fact, the Record discloses plaintiff's employment in other job capacities. This should not be confused with the elements of the tort complained of—a wrongful interference with plaintiff's employment as job superintendent for the William B. Pollock Company.

ond Defense:" "* * * that any conduct in which they may have engaged with respect to the William B. Pollock Company, and the plaintiff's employment as a *superintendent or supervisor* for that company was within the protection of Section 7 of the National Labor Relations Act * * *" (Emphasis added). (R. 12).

The Supreme Court of Michigan, in sustaining a default judgment against a union after the union specifically pleaded the lack of jurisdiction of the state court, commented: "That burden rests on the affirmative pleader, and our trial courts are not to be toyed with by the practice of depositing such a pleading and then ignoring the court. Which is to say that this defendant labor union should have presented proof in support of its jurisdictional plea if possessed of such proof." *Haenlein v. Saginaw Building Trades Council, et al.*, 361 Mich. 263, 269, 105 N. W. 2d 166, 169 (1960); cert. denied, 305 U. S. 816 (1961).

Plaintiff, at the time of the tort, was a supervisor. As a supervisor, plaintiff was exempt from the provisions of the Act, and by being exempt, he could not claim protection under the Act even though he was a union member. The record is unequivocal as to plaintiff's status as a supervisor and Respondents admit his status both in the answer filed at the trial level and in their brief filed in this Court.

It is submitted that the trial court correctly exercised jurisdiction over the subject matter of this action.

## II.

### The Type of Conduct Involved in "Perko v. Local 207."

The fact that plaintiff was a supervisor did not prevent him from being a union member.[1] As a union member, plaintiff must abide by union rules or risk loss of union membership. However, the courts have consistently

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[1] 29 U. S. C. § 164(a).

held that there can be no discriminatory discharge or unfair labor practice as to union conduct directed toward supervisors.[1] "The law is clear that a supervisor is not entitled to protection afforded ordinary employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice." *N. L. R. B. v. Fullerton Publishing Company,* (C. A. 9), 283 F. 2d 545, 551 (1960), citing *L. A. Young Spring & Wire Corp. v. N. L. R. B.,* 163 F. 2d 905 (1947), *cert denied,* 333 U. S. 837, and others.

Similarly, the right of employees to engage in concerted activities for the purpose of mutual aid and protection is not unlimited in the sense that such right can be exercised without regard to rights of others and duties which may be owed to the employer. *N. L. R. B. v. Rockway News Supply,* 197 F. 2d 111 (1952). The hiring, discharging and conditions of employment of supervisory personnel are strictly the prerogative of management and concerted activity to influence the exercise of such prerogative is unprotected. *N. L. R. B. v. Ford Radio & Mica Corporation,* 258 F. 2d 457 (1958).

Petitioners assume throughout their brief that plaintiff's cause of action against the union is based on the fact that the union fined the plaintiff for violation of a union rule against assisting boilermakers. Petitioners explain that its action against the plaintiff was designed to preserve jobs for its members by securing the removal of a man

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[1] It is interesting to note that Petitioners, in their zealousness, claim that the union's conduct was "a concerted refusal to work" in an attempt to preserve their jobs, to force the employer, the William B. Pollock Company to assign particular work to their union rather than the boilermakers. This is a literal Section 8(b) (4) (D) violation and also a Section 303(a) (4) violation (as the Act was then worded) and actionable in any district court "or in any other court having jurisdiction of the parties" under Section 303(b) of the Act.

who was assigning work to a different craft, *ergo*, either arguably protected activity under Section 7 of the Act or prohibited activity under Section 8 of the Act. The statement that plaintiff's cause of action included plaintiffs being fined for violation of a union rule appears to be the major premise in petitioners' argument.[1]

This factual assumption is unjustified. Evidence was introduced at the trial by both sides to the controversy as to the trial of the plaintiff by the Executive Board of the union. However, counsel for defendant union requested that the court specifically instruct the jury as to this conduct on the part of the union, which request was granted, and the jury was instructed as follows:

> "Members of the jury, I charge you as a matter of law that the trial of Jacob Perko by the Executive Board of the Defendant Union on December 8, 1953, was an exercise of a lawful right of the Executive Board of the Defendant Union.
>
> "The findings and penalty of the Local Union as modified by the International Union cannot be questioned in this Court in this proceeding.
>
> "Therefore, the trial, the findings, and the penalty may not be used as evidence of a conspiracy by the Defendant Union against the plaintiff, Jacob Perko." (R. 168.)

At the trial the defendant union made no attempt to legitimate its conduct toward plaintiff, but instead flatly denied doing anything to hurt plaintiff. Counsel for Respondent do not feel that a brief in an appellate court is the time to speculate as to the union's motivation.

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[1] "* * * because he had violated the union's rule against assisting boilermakers * * *," Brief of Petitioners, page 19; "* * * because he refuses to comply with a union rule * * *"; "* * * for his violation of the union's rule against assisting boilermakers * * *," Brief for Petitioners, page 22; "* * * violated a union rule," Brief for Petitioners, page 23.

The trial court adequately and accurately instructed the jury as to the elements of a conspiracy both in its special instructions and in its general charge. It was made clear to the jury that the plaintiff, to sustain his allegations, must prove by a preponderance of the evidence the elements of a conspiracy "* * * that the acts be performed in furtherance of the *wrongful* purpose and be done by the conspirators *without any justification* on their parts." (R. 164.) "* * * and if you further find that such act or acts were *unjustified* * * *." (R. 167.) See also Record, page 172.

The type of conduct involved in this controversy between plaintiff and his union was determined by the unanimous verdict of a jury. Petitioners' entire argument that the union's conduct was also prohibited by the N. L. R. A. is based on factual allegations made only after the jury returned a verdict adverse to their cause.

## III.

## The Ohio Court's Ruling Is in Accord With Principles Established by the Supreme Court.

The record clearly shows that plaintiff's difficulty was a matter between plaintiff and his union. (R. 38.) The union conduct was directed at plaintiff's continued employment as job superintendent. It did not involve conduct of plaintiff's employer toward the ironworkers, pending requests for assignment of particular work, grievances, collective bargaining, or a labor-management dispute. Thus, the unlawful union conduct was in an area peripheral to the purposes of the National Labor Relations Act, whose concern is relations between unions and employers, not between unions and their members.

Congress has not restricted the power of a union to select its members. In fact, Congress took special pains

to make clear that the restraints on unions imposed by the National Labor Relations Act did not permit the NLRB to regulate union membership requirements.

Section 8(b)(1)(A) of the Act provides:

> "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7; *provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein* * * *." (Emphasis added.)

Legislative concern with the narrow question of whether the language of Section 8(b) would be construed to restrain union membership policies is demonstrated by the following exchange in the Senate:

> "The Acting President pro tempore. The chair understands that the Senator from Florida has withdrawn his previous amendment, and is now offering another amendment, which will be stated.
>
> "The Chief Clerk. It is proposed to amend the so-called Ball amendment by inserting after the figure '7', the following: Provided, that this subsection shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.
>
> "Mr. Ball. I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. *It was never the intention of the sponsors of the pending amendment to interfere with the internal affairs or organization of unions.* The amendment of the Senator from Florida makes that perfectly clear. (Emphasis added.)"

II Legislative History of the Labor-Management Relations Act of 1947, 1141-42 (1948).

The NLRA provides that the NLRB is not to use either Section 8(b)(1) of the NLRA or any other subsection of Section 8(b) as a basis for regulation of union membership. Congress simply excluded an administrative agency which was specifically charged with other tasks from affecting union membership policies. A broader reading of Section 8(b)(1) is not justified.

A broad reading of the proviso to Section 8(b)(1) which would have foreclosed state jurisdiction over expulsion from unions was rejected by the Supreme Court in *International Ass'n of Machinists v. Gonzales*, 356 U. S. 617 (1958).

The Supreme Court in the *Gonzales* case stated:

> "But the protection of unions members in their rights as members from *arbitrary conduct* by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied.
>
> "The proviso to Section 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein' * * * 61 Stat. 141, 29 USC Sec. 158(b)(1). The present controvery is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for '*retention of membership* therein.' Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. See *United*

*Constr. Workers v. Laburnum Constr. Corp.*, 347 U. S. 656, 98 L. ed. 1025, 74 S. Ct. 833." Id. at p. 620.

"Although, if the union's conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is hereby presented, deprive a party of available state remedies for all damages suffered. See *International Union, United A. A. A.-I. W. v. Russell*, 356 U. S. 634, 2 L. ed. 2d 1030, 78 S. Ct. 932.

"If, as we held in the Laburnum case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the NLRB, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interests expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under Section 8(b)(2). This important distinction between the purposes of

> the federal and state regulation has been aptly described: 'Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination after union ouster from membership. The State Court proceedings deal with arbitrariness and misconduct vis-a-vis the individual unions members and the union; the Board proceeding, looking principally to the nexus between the union action and employer discrimination, examines the ouster from membership in entirely different terms.' *Isaacson, Labor Relation Law; Federal Versus State Jurisdiction,* 42 ABAJ 415, 438." (Emphasis supplied.) Id. at pp. 621-623.

The opinion in the *Gonzales* case, looked upon with favor in the *Garmon* case,[1] makes it clear that the acts complained of in the instant case are of the same peripheral nature as those spoken of in the *Gonzales* case. In fact, the acts in the instant case seem far more remote from conflict with Federal policy than those in the *Gonzales* case.

In the latter case of *Garmon,* the Supreme Court recognized the validity of its prior decision in *Gonzales* (p. 241 and p. 243):

> "As we pointed out the other day, the statutory implications concerning what has been taken from the states and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation. *International Association of Machinists v. Gonzales,* 356 U. S. 617, 619."

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[1] *San Diego Building Trades Council v. Garmon,* 359 U. S. 236 (1959).

> "However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. *International Association of Machinists v. Gonzales,* 356 U. S. 617."

The conduct before this Court is a "mere peripheral concern" of the National Labor Relations Act because, as in the *Gonzales* case, the dispute arises not against a background of employer-union conflict, but one of union-member conflict. That respondent performed management functions does not make the present dispute a labor-management dispute. The union's objection was to respondent as an individual. And respondent would be unacceptable to the union as a supervisor regardless of the employer for whom he might work. For that reason, respondent has sought his remedy in damages at common law and has completely removed himself from the field of labor relations.

## CONCLUSION.

Plaintiff, as a supervisor, does not have recourse to any protective measures of the National Labor Relations Act. A right so fundamental as the right to be secure in one's field of work cannot be collaterally extinguished by an Act that does not afford plaintiff any protection.

The union, on appeal, has built its argument on assumptions not supported by the record. The cause before this Court is not a hypothetical discussion of the purview of a Congressional enactment. The scope of this Court's

inquiry must be limited to the facts presented to the Court at the trial level, unextended and unembellished by counsel.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS AND JAMES CASTNER

*Petitioners.*

v.

JACOB PERKO

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*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

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## PETITIONERS' REPLY BRIEF

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*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

## PETITIONERS' REPLY BRIEF

The respondent's brief makes certain statements which perhaps require brief comment.

1. Respondent says that the "tort complained of" in this case was only wrongful interference with his employment as a superintendent, and that a superintendent, as distinguished from a "foreman" or "pusher" (R. 110, 117), is a supervisor under the National Labor Relations Act. On this factual premise, respondent bases his legal argument that the Act does not regulate the union action complained of here and would have afforded him no protection.

Both the factual premise and the legal conclusion are incorrect.

As we pointed out in our reply brief on the petition for certiorari, the complaint (R. 2), the respondent's testimony (R. 67), his lawyer's testimony (R. 78), the trial judge's instruction to the jury (R. 164-65, 170-71), and the opinion of the Ohio Court of Appeals (R. 182-83) all make it clear that respondent sought and recovered damages for loss of employment as *both* a superintendent and a foreman. And respondent does not argue that a foreman (or "pusher") is not an employee under the Act, entitled to all of its protections. (See our original brief, pp. 20-26).

Even if—contrary to the record—respondent had sought recovery only for loss of work as a supervisor, the consequence urged by respondent would not follow. Respondent's assertion that a supervisor "does not have recourse to any protective measures of the National Labor Relations Act" (Br. 15) is simply not true.

It is true that supervisors are excluded from the definition of "employee" under the Act, and therefore their rights under the Act are not the same as those of employees. But it does not follow that they have *no* rights.

The reason that the right of employees to organize bargain collectively, and engage in concerted activity was withheld from supervisors was that Congress wanted to give employers a free hand in hiring, firing, or otherwise dealing with supervisors, as the legislative history cited in respondent's brief makes clear (Br. 5). It was in furtherance of precisely this same policy that Congress, in Section 8(b)(1)(B) of the Act, specifically made it an unfair labor practice for a union to interfere with an employer's selection of supervisors. There can be no question that a supervisor, who is discharged as a result of union action which violates Section 8(b)(1)(B), would have recourse to the Board for appropriate relief, including back pay. See Section 10, 29 U.S.C. § 160.

Moreover, despite the statutory policy favoring maximum employer freedom in hiring and firing supervisors, the Board has held that it is an unfair labor practice for an employer to discharge a supervisor because of his refusal to participate, or participate with sufficient vigor, in the employer's antiunion campaign. The discharge of a supervisor in such circumstances, the Board has held, is unlawful because it coerces nonsupervisory employees as well, since it leads them "reasonably to fear that the [employer] would take similar action against them if they continued to support the Union." *Talladega Cotton Factory, Inc.*, 106 N.L.R.B. 295, 297 (1953), *enforced*, 213 F. 2d 209 (5th Cir. 1954). See also *General Engineering, Inc.*, 131 N.L.R.B. 648 (1961), *enforcement denied on other grounds*, 311 F. 2d 570 (9th Cir. 1962); *NLRB* v. *Brookside Industries, Inc.*, 51 L.R.R.M. 2148 (4th Cir. 1962); *NLRB* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (5th Cir. 1957), *cert. denied*, 355 U.S. 864 (1957). The Board has ordered reinstatement of the supervisor with full back pay in these cases. As we pointed out in our original brief, the same result would seem to follow, *a fortiori*, where the union obtains the discharge of a supervisor because of his failure to abide by union rules. Not only would such action have a similarly coercive effect on nonsupervisory employees, but no countervailing statutory policy is involved where it is the union, rather than the employer, which is responsible for the supervisor's discharge.

2. Respondent states that there is no basis in the record for assuming that the union's alleged interference with his employment was, as in *Radio Officers* v. *NLRB*, 347 U.S. 17 (1954), based on his violation of a union rule.[1] In mak-

[1] If the union had arbitrarily prevented the respondent from working for some reason other than his violation of a union rule, the question would arise as to whether even such conduct is an unfair

ing this assertion, respondent is disavowing the very theory on which he tried his case. It was respondent who introduced in evidence the fact that there had been a jurisdictional dispute between the ironworkers union and the boilermakers union in late 1953 (R. 23), and the fact that in early December, the same week the alleged tort was committed, the respondent had been tried and convicted for violating the union's rule against instructing boilermakers (R. 49). It was respondent's witness—and the only employer witness whose testimony in any way supported respondent's case—who stated on direct examination that in the "early part of December" representatives of the union told him "that Mr. Perko was educating the boilermakers in their particular work; so that they felt they weren't going to take orders from him any more" (R. 27). At no

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labor practice. The NLRB, in a recent decision, has held that "a statutory bargaining representative, and an employer also respectively violate Section 8(b)(2) and 8(a)(3) when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." *Miranda Fuel Co.*, 140 N.L.R.B. No. 7, 51 L.R.R.M. 1584, 1587 (1962). Thus the Board has now taken the position that it is an unfair labor practice for a union to injure an employee in his employment for any arbitrary reason, whether it is related to the employee's actions as a union member or not. While we agree with the Board that unions have a duty under the Act to represent employees fairly, see *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Syres* v. *Oil Workers*, 350 U.S. 892, *reversing per curiam* 223 F. 2d 739 (5th Cir. 1955), we are doubtful that that duty is enforceable through unfair labor practice proceedings. On the other hand, since the Board has so held, the question would appear to be sufficiently "arguable" to preclude state court jurisdiction. But the Court need not reach that question in this case, since it is clear that it is an unfair labor practice for a union to injure an employee in his employment because he violated a union rule, *Radio Officers* v. *NLRB*, 347 U.S. 17 (1959), and that is what is involved here.

time did respondent suggest that there was any other reason for the union's alleged action. It is too late for him to do so now.

Respectfully submitted.

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